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Oct 7. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 110.

J. W. WALLACE, ADMINISTRATOR OF DAVID QUINN,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1876.

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Contract - Infatuo - &c

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1 **United States Court of Claims.**

Petition.—Filed April 7, 1869.

DAVID QUINN
vs.
THE UNITED STATES.
} No. 5933.

Your petitioner, a citizen of the United States and of the State of Illinois, respectfully showeth that on the 31st day of July, 1867, in pursuance of an advertisement (a copy of which is hereto attached marked A, and made a part hereof) issued by the United States, through Brevet Colonel J. B. Wheeler, major of engineers, her agent, inviting proposals for removing a certain amount of trap-rock from the entrance to Eagle Harbor, on Lake Superior, in the State of Michigan, he became a bidder at a letting then had, and on the same day had the said work awarded to him, at the price of fifty-eight dollars a cubic yard; and on the 10th day of August then following made and delivered to the United States his bond, with two good and approved securities, in the sum of twenty thousand dollars, for the performance of the said work, as by said bond (a copy of which is hereto attached, marked B, and made a part hereof) is specified. And also, on the said tenth day
2 of August, entered into a contract, which is in the words and figures following, to wit:

Article of agreement, entered into this tenth day of August, eighteen hundred and sixty-seven (1867), between Brevet Col. J. B. Wheeler, major of engineers, of the one part, and David Quinn, of Chicago, of the county of Cook and State of Illinois, of the other part.

This agreement witnesseth that the said Brevet-Col. J. B. Wheeler, major of U. S. engineers, for and in behalf of the United States of America, and the said David Quinn, of Chicago, Illinois, for himself and his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, namely: That the said David Quinn, of Chicago, Illinois, shall remove the rock at the entrance of the harbor at Eagle Harbor, Michigan, and deposit it at such point as the engineer in charge may direct, the said David Quinn furnishing all the labor, boats, machinery, and appliances of every description necessary to remove the rock, so as to obtain a depth of not less than fourteen (14) feet at low water, in conformity with the terms proposed in the advertisement inviting proposals for the improvement of Eagle Harbor, Lake Superior.

For the removal of the rock named, the said Brevet Col. J. B. Wheeler, major of engineers U. S. Army, agrees to pay fifty-eight ($58.00) dollars per cubic yard.

That all work done, offered under this contract, shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as not conform to the specifications set forth in this contract shall be rejected.

That the said David Quinn shall commence the removal of the rock on or before the first day of September, eighteen hundred and sixty-seven (1867), and complete the removal of the rock on or before the 1st day of October, eighteen hundred and sixty-eight (1868). It is also
3 agreed that if, in any event, the contractor shall delay, or be unable to proceed with the work in accordance with the foregoing

terms, the engineer officer in charge shall have full right and authority to take away this contract, and employ others to complete the work, deducting the expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or non-compliance.

If the work proceed satisfactorily, payment shall be made from time to time upon those sections where the required depth has been obtained, reserving ten per centum from the payment until the whole shall have been completed and accepted.

No member of Congress, officer or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or any benefit which may arise herefrom.

In witness whereof, the undersigned have hereunto placed their hands and seals the day and date first above written. Executed in quintuplicate.

J. B. WHEELER, [L. S.]
Major of Engineers and Brevet Colonel.
DAVID QUINN. [L. S.]

Witnesses:
JAMES H. SOUTHALL,
A. MACKENZIE,
Captain U. S. Engineers.

And your petitioner further showeth that by said contract he became obligated to the United States to remove all the rock from the said entrance, included within an area of one hundred and thirty by two hundred and sixty feet, to a depth of not less than fourteen feet below low water at said entrance; to commence the work on or before the first day
of September, 1867, and to complete it on or before the 1st day of
4 October, 1868. And for the removal of the said rock the United
States then and there became obligated to him to pay him fifty-eight dollars a cubic yard. And upon the work progressing satisfactory to pay him from time to time on those sections where the required depth had been obtained, reserving therefrom ten per centum until the whole work should be completed.

And he further showeth that in pursuance of his said obligation, he commenced at once to make the necessary preparations for performing the said work, and proceeded to the said Eagle Harbor, and, on the said 1st of September, 1867, and for a number of days both before and after that time, was there ready to commence work as required by the said contract. But no one was there to represent the United States, or to mark out or locate the said work, as the United States was in duty bound to do, if the work was to be completed within the time provided in said contract; nor was it located until about the 8th day of February, 1868, when nearly half the time for the performance thereof had expired; which failure of the said United States both hindered and injured your petitioner in the progress of the work.

But, understanding from the engineer in charge and from other sources, that it was a custom of the Engineer Department of the said United States, to extend the time of like contracts, when the contractor had been prevented from completing his work by unforseen events, where proper diligence has been used, or where the government herself had been in fault in regard to something required of her to be done, or
where the work done exceeds the appropriation, he proceeded
5 with the said work with all due diligence, as required by the con-

tract, with the hope of finishing it within the time of the contract, if possible, and if not, of having his time extended.

With these views he proceeded to break and remove, but more particularly to prepare the rock to be broken and removed at a future time, either within the time of the contract or after it, as events might determine.

In this way he proceeded, and had the full approbation of the engineers in charge, and of their entire satisfaction with his mode and manner of operations. No fault was found or objections made to any of his proceedings during the time of the contract, and money payable on the satisfactory progress of the work, was paid him within a few days of the end of the contract time, though it was then evident that the job could not be completed within the time named.

With these encouragements and assurances of the engineers in charge of the work, Henry Bacon, the assistant, informing your petitioner that he would favor an extension of time if your petitioner desired it, and the said J. B. Wheeler to the like effect assuring him that there would be no difficulty in his getting an extension of time, your petitioner proceeded with his operations, and, although variously hindered by very extraordinary unfavorable weather, succeeded, within the remaining time of his contract, in removing about three hundred cubic yards of the said rock, and of preparing the residue for future removal, by perforating it with holes, by means of which his future expenses of removing it would have been greatly reduced. To all of which he further
shows that no objections were made, or anything but approbation
6 manifested to him by the said engineers during the specified time
of his said contract. And as the work is one requiring no particular haste, as he here avers, and as the government had been in fault in not surveying and locating the work to be done in due time, your petitioner avers that he was entitled to further time for the performance of the contract, and he apprehended no difficulty in getting an extension of time if required, nor prejudice to his interests in so preparing the rock for future removal.

And your petitioner further showeth that he experimented largely in various ways, with both gun powder (the explosive formerly used for such purposes) and nitro-glycerine, and at the cost of much time, labor, and money, in his efforts to ascertain the cheapest and best mode of breaking the said rock; and, in so doing, proved the great superiority of the latter over the former compound for breaking rock under water; and that he provided himself, at great expense, with boats, rafts, anchors, lines, drilling, dredging and grappling machinery, wires, fuses, electrical batteries, powder, oils, acids, diving-armor, hoes, pumps, shops, tools, and various other appliances with which to do the said work; and that he drilled into the said rock within eighty feet in width of the said channel, to which, by the said engineers, he was restricted in his operation, about four hundred and fifty (two to two and a half inch) holes, a few of which he charged and fired with powder, about fifty with nitroglycerine, and the balance of which he plugged with wooden plugs, to prevent their filling with sand, during the season when the work could not be proceeded with, and until the time when they could be charged
and fired, in which condition they now remain ready for said
7 purpose. All of which pertain to and are of great value in the
removal of the said rock.

Your petitioner further says that the work being uncompleted at the time specified for completion by the said contract, for the reason above stted, ahe applied to the Engineer Department for an extension of time, but such extension, to his very great surprise, was denied him. He was not only willing but anxious to proceed with the said work, and for that privilege made numerous other efforts, which he urged upon the Engineer Department with all the means in his power. But all were to no avail. The said engineers had then learned that the work could be done at less than your petitioner's prices, and that there was not money enough in the Treasury applicable to the said improvement, to finish it under your petitioner's contract, and that Congress had passed a law, to wit, on the 25th of July, 1868, after your petitioner had done the greater part of the said work, and all before he had been apprised of such law being enacted, the third section of which prohibits the government officers from obligating the government for the payment of more money for any particular work than there is money in the Treasury applicable to the work for which the obligation is incurred, and they persisted in their refusal to extend the said time or permit your petitioner to proceed therewith.

The failure of certain parties to furnish your petitioner, in the said harbor, with nitro-glycerine, in the month of May of said year 1868, was a hindrance to him in breaking the said rock, and such failure, in a letter of October 5, 1868, to the said J. B. Wheeler, who had informed your petitioner that there would be no difficulty in his getting an
8 extension of time, who knew of the failure of the government to locate the work until nearly half the time of the contract had expired, and who was, as your petitioner then supposed, entirely favorable to an extension, was presented as the cause of the work lying in its then unfinished condition. Your petitioner then supposed that the showing was but a mere matter of form, and that a reason, such as a failure of the engineers to be ready with work let in due time, which might have been construed into a reflection on them, might prejudice your petitioner's interests with them, omitted the government failure, and wrote the said letter as it now appears. He then had been in conversation with the said Wheeler, and understood him to require nothing but such showing to secure for your petitioner an extension and permission to proceed with the work. But on discovering that the said showing was looked upon as much more than mere form, and that he had misunderstood the said Wheeler, he made to the said department other showings in which the said failure of the government and the value of the work done exceeding the appropriation were presented.

The arrival of the nitro-glycerine would have enabled your petitioner to have broken more rock than he has broken, but its use would have impeded the drilling, which, with a double force of men at work day and night, during most of the summer, ran his operations to accomplish the work done to within a few days of the setting in of the fall winds, when, during their prevalence, nothing could be done.

And your petitioner further showeth that the said drilling and the experiments, demonstrations, and preparations made by him in
9 and about the said inlet, are of great value to the United States, to wit, of the value of twenty dollars for each and every cubic yard of rock yet unremoved from the said inlet, to the width of one hundred and thirty feet thereof, and has enabled her to relet the removal of the said rock at eighteen dollars a cubic yard less than your petitioner's prices, under a contract more favorable to her in its details than is your petitioner's, and at a time exceedingly unfavorable and improperly selected by her for such letting.

And he further showeth that when he had so prepared the rock for removal, that responsible parties, accustomed to doing like work, proposed doing the further work of removing the said rock, according to the requisitions of his said contract, under a sub-contract, at the price of thirty dollars a cubic yard, and for such sum he believes, and so here charges, that the work could have been let, and still could be let under a contract corresponding with your petitioner's in all but the price of removing the rock.

And he further showeth that the amount of rock yet unremoved from the said inlet, and included within his said contract, has been measured by the said assistant, Henry Bacon, and reported by him to be three thousand three hundred and seventy-three cubic yards, which said amount your petitioner here accepts and so charges to be correct, but subject to be increased or reduced, as the case may be, by a remeasurement, which is promised to your petitioner by the said engineers.

And your petitioner further showeth that for three hundred cubic yards of rock removed he has been paid at his said contract price, less ten per centum retained from him, but for the other labor and service so rendered and performed by him he has not been paid, nor for
10 any part thereof, all of which work, services, and performances were done and rendered by him under his said contract and in pursuance thereof, and that the same is a part and parcel of the process of removing the said rock, and that they exceed in value the amount of money that remained unexpended, at the expiration of his said contract, of the appropriation made for the said improvement.

But one appropriation, he further shows, was made for the said work, to wit, an appropriation of sixty-five thousand dollars, made prior to the letting of the said work to your petitioner as aforesaid, since which Congress has failed to appropriate anything more. Wherefore, he says that inasmuch as he over-worked the appropriation made for the said improvement, within the time of his said contract, the failure of the government to measure and locate the said work on or before the said 1st day of September, 1867, as she should have done, and because of the said act of Congress prohibiting the government officers as aforesaid, he was not obligated to do more than he has done to secure his rights acquired as aforesaid, and that in view of the whole facts herein set forth he is now entitled to full compensation for all the work and labor so done and for all services so rendered by him, and to the full benefits of his said contract, and to compensation for all injuries done him by the said government as aforesaid.

And he further says that he presented his claim to the Engineer Department of the government having charge of such contracts, and that the said department has refused to recognize the said claim, or any part thereof.

He, therefore, in consideration of the said facts, says that the
11 said United States is indebted to him as follows, to wit: First, in the sum of one thousand seven hundred and forty dollars for the per centum retained from him on the payments made to him, for the removal of three hundred cubic yards of rock; and, secondly, in the sum of twenty dollars a cubic yard, for work and labor done, experiments made and services rendered in and upon the rock yet remaining unremoved as aforesaid, to wit, the sum of sixty-seven thousand four hundred and sixty dollars, and, also, in a large sum of money for damages, not herein computed, done to him by the said United States, by her actions as aforesaid, which said computed sums amount in the aggregate, subject to revision by remeasurement as aforesaid, to sixty-nine thousand and two hundred dollars, for which he now prays judgment against the said United States.

And your petitioner further showeth that he is the original owner of the said claim, and no one else now has, or ever has had, any interest therein; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

DAVID QUINN.

T. D. LINCOLN,
Counsel for Petitioner.

THE STATE OF OHIO,
Hamilton County, ss:

Personally appeared before me, a notary public in and for the said county, David Quinn, the above-named claimant, who, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made to any person whomso-
12 ever, and that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, except as in said petition mentioned, and that he believes the facts as stated in said petition are true.

DAVID QUINN.

Sworn to and subscribed before me this 3rd day of April, 1869.
[SEAL.] R. S. FULTON,
Notary Public, Hamilton County, Ohio.

Claimant, DAVID QUINN, *Chicago, Illinois.*
Attorney, T. D. LINCOLN, *Cincinnati, Ohio.*

13 A.

Improvement of Eagle Harbor, Lake Superior.

U. S. ENGINEER'S OFFICE, NO. 512 MAIN STREET,
MILWAUKEE, WIS., *July* 10, 1867.

Sealed proposals, in duplicate, will be received at this office until 2 p. m., July 31, 1867, for removing the rock from the entrance to Eagle Harbor.

Contractors will state the price per cubic yard for removing the rock and depositing it in such places as may be indicated, furnishing all the labor, machinery, and appliances of every description necessary to do the work.

There are about eighteen hundred and three (1803) cubic yards of trap-rock to be removed, situated in the middle of the entrance, included within an area of two hundred and sixty (260) by one hundred and thirty (130) feet, and in a depth of water not less than ten (10) feet.

This rock must be so removed as to obtain a depth of not less than fourteen (14) feet at low water.

The work to be commenced on or before the 1st of September, 1867, and finished by October 31, 1860.

Contracts, with bonds in triplicate, signed by two sureties, in the sum of $20,000, for the faithful performance of the contract, must be executed within ten days from the time of opening of the bids.

Each bid, to have consideration, must obtain a written guaranty of two responsible names, and give satisfactory evidence that the bidder possesses the necessary skill and experience to do the work. A printed copy of this advertisement must be attached to each proposal.

Blank forms of proposals, with forms of guaranty, will be furnished from this office upon application.

Proposals will be endorsed: Proposals to remove the rock at Eagle Harbor, and addressed to

Brevet-Colonel J. B. WHEELER,
Major of Engineers, Milwaukee, Wis.

14 B.

Bond.

Know all men by these presents, that we, David Quinn, of Chicago (principal), and Oehmig Bird and Charles E. Sturgis (sureties), of Fort Wayne, Indiana, are held and firmly bound to the United States of America in the sum of twenty thousand dollars ($20,000) lawful money of the United States; for which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, dated the tenth day of August, in the year of our Lord eighteen hundred and sixty-seven (1867).

The nature of this obligation is such, that if the above bounden David Quinn, his heirs, executors, and administrators, or any of them, shall and do in all things well and truly observe, perform, fulfill, accomplish, and keep, all and singular, the covenants, conditions, and agreements whatsoever, which, on the part of the said David Quinn, his heirs, executors, or administrators, are or ought to be observed, performed, fulfilled, accomplished, and kept, comprised or mentioned in certain articles of agreement bearing date the tenth day of August, eighteen hundred and sixty-seven (1867), between B't-Col. J. B. Wheeler, major Corps of Engineers U. S. Army, and the said David Quinn, concerning the removal of rock from Eagle Harbor, on Lake Superior, in the State of Michigan, according to the true intent and meaning of said articles of agreement, then the above obligation to be void; otherwise to remain in full force and virtue.

DAVID QUINN. [SEAL.]
OEHMIG BIRD. [SEAL.]
CHA'S E. STURGIS. [SEAL.]

Witnesses:
T. L. TURSTE.
WILLIAM L. BABY.

15 In the Court of Claims, Dec. term, 1868.

DAVID QUINN
vs. } No. 5933.
THE UNITED STATES.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $69,200.00, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

16 And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed May 23, 1869.

17 United States Court of Claims.

Amended petition.—Filed Jan. 15, 1874. A. H.

DAVID QUINN, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT. } No. 5933.

And the said claimant now comes and, by leave of the court, amends his petition as follows, to wit:

He shows to the court that on the 31st day of July, 1867, in pursuance of an advertisement issued by the defendant (a copy of which is attached to his original petition, marked "A"), inviting proposals for the removal of a body of trap-rock (represented to be about 1,803 cubic yards) from the entrance to Eagle Harbor, on Lake Superior, that he became a bidder, and on the same day, at Milwaukee, in the State of Wisconsin, had the said work awarded to him.

He also shows that, in pursuance of the requisitions of the said advertisement, and in pursuance of the award of the work so made to him, he, on the 10th day of August then following, made and delivered to the said defendant his bond, with two good and approved sureties, in the sum of $20,000 (a copy of which is attached to his original petition, marked "B"), conditioned for faithful performance, as therein specified; and also, on the same 10th day of August, at Milwaukee aforesaid, entered into a written contract (a copy of which is shown on page 77 of the claimant's printed evidence, and made part hereof) with the said defendant, whereby he shows that he became obligated to the said defendant to remove the said rock from the said entrance, and to deposit it at such point as the engineer in charge might direct; 18 also, that he thereby became obligated to furnish all the labor, boats, machinery, and appliances of every description necessary to remove the said rock, so as to obtain a depth of not less than fourteen feet at low water, in conformity with the terms of said advertisement; also, to commence the removal of the said rock on or before the first day of September, 1867, and to complete the same on or before the first day of October, 1868; and for the removal of the said rock the said defendant, by the same instrument of contract, then and there obligated herself to pay him the sum of fifty-eight dollars a cubic yard; and also, upon the work progressing satisfactorily, to pay him from time to time, upon those sections where the required depth should be obtained, reserving ten per centum until the whole work should be completed and accepted.

And your petitioner further shows that, in pursuance of his said obligation, he commenced immediately to make the necessary preparations for the execution of the said work; to provide himself with men, means, and appliances; and on the first day of September, 1867, was at the said inlet ready to commence operations, as by the said contract he was required to do. But he further shows that neither the said rock, nor the area containing it, was then marked out upon the ground, nor was its position in any way defined with that accuracy which such work required for execution, nor was there any one there, nor for a long time thereafter, to represent the said defendant, and show your petitioner where to work and what to do. His contract, however, informed him that the rock to be removed lay within an area of 260 by 130 feet, situated in the middle of the entrance of the said harbor. But said entrance, he shows, is a strait or water-passage of about 1,500 feet in width, intervening between two headlands which separate the harbor from the lake; and that the said area, when afterwards discovered, was found to be situated in the said entrance, about 500 feet from one headland, and about 1,000 feet from the other.

19 The said work, he also shows, was such as required a careful measurement and estimate of the rock to be removed, and a visible identification of the boundaries of the area to be excavated, and also an established low-water mark or level, to direct the depth to which the excavations were to be made; and these requisitions, he further shows, were of preliminary necessity to the removal of the said rock, and their execution and establishment duties incumbent on the said defendant.

He also shows that, by his said contract, he was obligated to deposit the removed rock at such point as the engineer in charge might direct. But no such directions, he shows, were given him, nor any of the above-named duties incumbent on the said defendant performed, until long after the time at which, by the said contract, he was required to commence the removal of rock.

But he further shows that, in the latter part of October of the said year 1867, Henry Bacon, an assistant engineer, and of special charge under J. B. Wheeler, of general charge, appeared at the said harbor, and then, by citing with the ranges of certain objects on the shore, pointed out to your petitioner the locality in which the said area, beneath the water which flowed over it, was presumed to be. But it was then discovered that the report made to the engineer bureau of this work by General Reynolds (printed in Ex. Doc. No. 56, Part 2, 39th Cong., 2d Sess., H. R., pp. 82 and 83), and with reference to which all prior proceedings had then been made, was variously incorrect; whereupon a remeasurement was resolved upon. But no such measurement, he further shows, was made until February, 1868. Then he shows that a remeasurement was made; and that the said area of 260 by 130 feet, instead of containing but 1,803 cubic yards of rock for removal, to furnish a depth of 14 feet of water at low water, required the removal of 3,616 cubic yards.

Upon this discovery, he further shows that the said channel or area was reduced from the said 130 feet of width to 80 feet, and its location
fixed between 25 and 105 feet west of what was, until then, un-
20 derstood to be the middle of the channel, under the plan as re-
ported by General Reynolds.

This remeasurement and reduction of the width of channel, he further shows, was completed on the eighth day of February, 1868, and then the said channel (measured and defined) for the first time given over to your petitioner for the execution of his contract. Thus he shows that he could not, with any reasonable possibility of knowing where to work or what to do until then, have proceeded with the removal of the said rock, as required by his said contract; and he also shows that during all the preceding time of his said contract, down to the said eighth day of February, as aforesaid, he held himself in readiness to commence operations, as required by his contract, whenever the defendant became ready to have such operations performed. But said defendant, he avers, did not get ready until the said eighth day of February, when, as he further shows, five months and eight days of the said contract time had drifted away.

And he further shows that as soon as the said defendant was ready for the performance of his labors in the removal of the said rock, that he commenced breaking and removing the same with an ample force of men and means, and so continued to break and remove, when not interrupted by causes over which he had no control, during the remainder of the said contract time.

But the said channel, he further shows, although so reduced in its area, still contained more rock for removal than was by the said advertisement represented to be contained in the said area of 130 by 260 feet. It contained 2,040 cubic yards of rock for removal.

But this amount of rock from an area thus reduced, he further shows, was more rock than could then have been removed, as required by the said contract, from the said area or channel, within the balance of the contract time then remaining unexpired. But a usage or custom, he
was informed by the engineer in general charge of the said Eagle
21 Harbor improvement, and others, existed in the engineer depart-
ment or bureau of the said United States, of extending the time for the execution of contracts so delayed by the government, where due diligence was afterwards displayed by the contractor. Under this information and various assurances given him by the said engineer, that the said custom was never departed from where due diligence was performed by the contractor in the prosecution of the work, he proceeded to break and remove rock from the said channel, but more particularly to prepare the whole rock for removal at a future time within the said contract time, if possible, and, if not, then in such future time as might become necessary.

Thus he shows that he was hindered and delayed by the said defendant, and that after such hindrances and delay that he was duly diligent in the prosecution of the said work.

He also shows that he provided labor, boats, machinery, and appliances of every description necessary to remove the said rock, as by his said contract he was required to do; also, that he expended large sums of money and much time and labor, and that he employed much skill and ability in experimenting on the said rock in developing a cheap and efficient method of breaking and removing it. And also that he employed extraordinary as well as ordinary appliances, among the former of which he says were rafts of his own invention, so constructed as to be particularly adapted to the said work, and to which the said defendant, on the 3d day of November, 1868, acknowledged his exclusive right by letters-patent No. 83662, then issued to him.

And he further shows that, with this invention, and by working in the midst of winter, and by night as well as by day in the summer season, that he succeeded, within the remnant of the contract time so given him as aforesaid, in removing and depositing, as directed by the engineer in charge, three hundred cubic yards of the said rock. Also
in breaking one hundred and fifty cubic yards more thereof, and
22 also in perforating the remainder of the said rock to be removed
with a sufficient number of drill-holes to break it all up (when properly charged and fired) for removal. And for the removal of the said three hundred cubic yards of rock the said defendant paid him, as

he further shows, at the said contract price, less ten per cent. withheld, according to the provisions of the said contract.

And he further shows that the work done by him in and about the rock which remained in the said proposed channel, unremoved at the expiration of the said contract time, was a large proportional part of the work required for the said rock's removal, to wit, that it was three-fourths of the whole work required to complete the said channel, as by the said survey of February, 1868, and the said contract, was required to be done.

And he further shows, that during the whole course of his operations on and about the said rock and the said channel containing it, that nothing but the most decisive approbation of his movements and means and appliances was evinced towards him by the said engineers, and that money due to him for rock removed under the provisions of the said contract, but payable only upon the condition of the work progressing satisfactorily, was paid to him from time to time down to within twenty days of the expiration of the said contract time, nor was any fault found that he is aware of with either his methods or his means or energies until the said work and labor and performances were, by the said promises and encouragements and assurances, obtained from him.

And he further shows, that the work and performances so done by him were parts and parcels of the process of removing the said rock, and that they were of great value to the said defendant.

And he further shows, that when the said contract time expired, that he made application to the said defendant, in manner and form as by the said engineer in general charge he was advised and directed to do,
for a reasonable extension of time in which to complete the said
23 work, and that he was then and there able and willing to so proceed and complete the said work in a reasonable time.

And he further shows that his application so made was, to his great damage by the said defendant, on the 22d day of October, 1868, rejected and refused, and his contract from thenceforward held by said defendant to be null and void.

And he further shows, that afterwards, on the day of March, 1869, and before the commencement of this suit, at the city of Washington, that he made application to the said defendant, at the War Department of the said government, for the money due him, because of the premises aforesaid, but all payments, he further shows, was then and there refused him.

Whereupon the said claimant avers that he is entitled to receive of the said defendant, in consideration of the said premises, the sum of $99,942, as follows, to wit: First, in the sum of $1,740, for money withheld from him as percentage on payments made for rock removed; and, second, in the sum of $98,202, for preparing the rock left unremoved in the said channel for removal as aforesaid, and for the perspective profits to which, because of the said premises, he is entitled; and for which $99,942 he prays judgment, and such other relief as he may be entitled to, against the United States.

T. D. LINCOLN,
Counsel for Claimant.

Post-office: T. D. Lincoln, Cincinnati, Ohio; David Quinn, Cincinnati, Ohio.

THE STATE OF OHIO,
Hamilton County, *ss:*

Personally appeared before me, a notary public in and for said county, David Quinn, the above-named claimant, who, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, 24 or any interest therein, has been made to any person whomsoever; and that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, except as in said petition mentioned; and that he believes the facts as stated in said petition are true.

DAVID QUINN.

Sworn to before me, and subscribed in my presence, this 27th day of December, A. D. 1873.

EDWARD ADLETA,
Notary Public, Hamilton County, Ohio.

(N. fee, 40 c., paid by affiant.)

(Indorsed:) No. 5943. United States Court of Claims. David Quinn v. The United States. Amended petition. Filed Jan. 15, '74. A. H.

T. D. LINCOLN,
Counsel for Claimant.

25 In the Court of Claims, Dec. term, 1874.

(Extract from journal of the court of April 21, 1875.)

DAVID QUINN
vs.
THE UNITED STATES. } No. 5933.

M'r Lincoln, for claimant, filed motion suggesting the death of David Quinn, the claimant, and asking that the suit be continued in the name of J. W. Wallace as administrator.

Allowed.

By the court.

A true copy.

26 In the Court of Claims.

J. W. WALLACE, ADMINISTRATOR OF DAVID Quinn,
vs.
THE UNITED STATES. } 5933.

At a Court of Claims held at the Capitol, in the city of Washington, the sixth day of March, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

27 In the Court of Claims, Dec. term, 1875.

J. W. WALLACE, ADMINISTRATOR OF DAVID Quinn,
vs.
THE UNITED STATES. } No. 5933.

And now comes the petitioner in the above-entitled cause, and, by his attorney, moves the court for the allowance of an appeal to the Supreme Court of the United States from the judgment dismissing the petition in the above-entitled cause rendered by the Court of Claims on the 6th day of March, A. D. 1876.

T. D. LINCOLN,
Att'y for Claimant.

Filed April 11, 1876.

Ordered, that the appeal be allowed as prayed for.
By the court.
April 6, 1876.

28 United States Court of Claims.

DAVID QUINN'S ADMINISTRATOR
vs.
THE UNITED STATES.
} No. 5933.

FINDINGS OF FACT BY THE COURT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 10th day of July, 1867, the following advertisement was published by Col. J. B. Wheeler, of the Engineer Corps of the United States Army, then acting as superintending engineer of harbor improvements in Lake Superior and Lake Michigan:

Improvement of Eagle Harbor, Lake Superior.

U. S. ENGINEER'S OFFICE, NO. 512 MAIN STREET,
Milwaukee, Wis., July 10, 1867.

Sealed proposals, in duplicate, will be received at this office until 2 p. m., July 31, 1867, for removing the rock from the entrance to Eagle Harbor.

Contractors will state the price per cubic yard for removing the rock and depositing it in such places as may be indicated, furnishing all the labor, machinery, and appliances of every description necessary to do the work.

There are about eighteen hundred and three (1,803) cubic yards of trap-rock to be removed, situated in the middle of the entrance, included within an area of two hundred and sixty (260) by one hundred and thirty (130) feet, and in a depth of water not less than ten (10) feet.

This rock must be so removed as to obtain a depth of not less than fourteen (14) feet at low water.

The work to be commenced on or before the 1st of September, 1867, and finished by October 31, 1868.

Contracts, with bonds in triplicate, signed by two sureties, in the sum of $20,000, for the faithful performance of the contract, must be executed within ten days from the time of opening of the bids.

Each bid, to have consideration, must obtain a written guaranty of two responsible names, and give satisfactory evidence that the bidder possesses the necessary skill and experience to do the work. A printed copy of this advertisement must be attached to each proposal.

Blank forms of proposals, with forms of guaranty, will be furnished from this office upon application.

Proposals will be indorsed: Proposals to remove the rock at Eagle Harbor, and addressed to

Brevet Colonel J. B. WHEELER,
Major of Engineers, Milwaukee, Wis.

II. David Quinn, the claimant's intestate, then a resident of Chicago, Ill., made a proposal for the doing of the work called for in said advertisement, and the contract therefor was awarded to him.

III. In pursuance of the award, the following contract was entered into between Quinn and the United States:

29 Articles of agreement entered into this tenth day of August, eighteen hundred and sixty-seven (1867), between B'v't Col. J. B. Wheeler, major of Engineers, of the one part, and David Quinn, in the county of Cook, State of Illinois, of the other part.

This agreement witnesseth: That the said B'v't Col. J. B. Wheeler, major U. S. Engineers, for and in behalf of the United States of America, and the said David Quinn, of Chicago, Illinois, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other in the manner following, namely:

That the said David Quinn, of Chicago, Illinois, shall remove the rock at the entrance of the harbor at Eagle Harbor, Mich., and deposit it at such points as the engineer in charge may direct, the said David Quinn furnishing all the labor, boats, machinery, and appliances of every description necessary to remove the rock so as to obtain a depth of not less than fourteen (14) feet at low water, in conformity with the terms proposed in the advertisement inviting proposals for the improvement of Eagle Harbor, Lake Superior.

For the removal of the rock named, the said B'v't Col. J. B. Wheeler, major of Engineers, U. S. Army, agrees to pay fifty-eight (58.00) dollars per cubic yard.

That all work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the officer or agent in charge, as to quality and quantity, shall be final.

That the said David Quinn shall commence the removal of the rock on or before the first day of September, eighteen hundred and sixty-seven (1867), and complete the removal of the rock on or before the first day of October, eighteen hundred and sixty-eight (1868.) It is also agreed that if, in any event, the contractor shall delay or be unable to proceed with the work in accordance with the foregoing terms, the engineer officer in charge shall have full right and authority to take away this contract and employ others to complete the work, deducting expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or non-compliance. If the work proceed satisfactor'y, payment shall be made from time to time upon those sections when the required depth has been obtained, delivered, and accepted, reserving ten per centum from the payment until the whole shall have been completed and accepted.

No member of Congress, officer or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals, the day and date first above written.

(Executed in quintuplicate.)

J. B. WHEELER, [L. S.]
Major of Eng's & B'v't Colonel.
DAVID QUINN. [L. S.]

Witnesses:
JAMES H. SOUTHALL.
A. MACKENZIE,
Capt. U. S. Eng'rs.

30 IV. On the day of the signing of this contract, Quinn executed a bond to the United States, with two sureties, as required by the advertisement.

V. On the 29th of August, 1867, Quinn went to Eagle Harbor and remained there more than three weeks. Immediately after he went there he engaged in making inquiries as to what kind of materials and help he could get there to do the work under said contract, and in seeing mechanics, laborers, and others in reference to the doing of said work. About the 1st of September, 1867, he engaged the services of a blacksmith at Eagle Harbor to make tools for him, and the blacksmith, in the early part of that month, made for him four drills, 14 and 16 feet long, and a dozen grasping-hooks.

VI. During the whole time he was at Eagle Harbor on that occasion, there was no officer or agent of the United States there representing the United States in reference to the work to be done under said contract.

VII. While the advertisement for proposals was pending, and before the contract was awarded, Colonel Wheeler had, on the table in his office, for the information of bidders and contractors, a copy of Executive Document No. 56, part 2, Thirty-ninth Congress, second session, House of Representatives, in connection with which was an engraved sketch of Eagle Harbor, accompanying a lake-survey chart of the same; on which sketch there was an area marked out in red lines, within the limits of which the rock obstructing navigation was to be excavated; also a small tracing showing the soundings taken over that area. Quinn saw that sketch there, and shortly after the contract was awarded to him, and before the time he was required to begin operations thereunder, he was, by order of Colonel Wheeler, furnished with a copy of said sketch. Upon that sketch was marked a line, starting from a point on the shore, extending out into the lake, and passing through the middle of the area, and dividing it into two equal parts, each of 65 feet in width by 260 feet in length. This line indicated the position of the channel at the entrance of the harbor, and was called the range line, because it was the line that would coincide with the range of two painted poles set in the shore, from 15 to 30 feet in height, one near the water's edge and the other farther back inland, which had been set up by the Light-House Department in order to show to vessels entering the harbor the exact position of the channel. There was a painted object on each pole, visible in the day-time, and at night a light was placed on each.

By the sketch aforesaid, the position of the area, as it was proposed at the time of the letting of the contract, could have been readily found by any competent person with the aid of instruments, such as are used by the Engineer Corps. There were no buoys or other objects in the channel itself which would indicate the location of the work; and the location could not have been found definitely from the soundings marked on the sketch. The location would have had to be ascertained with instruments by measurements of distances and bearings from points on the shore; and the nearest shore was about 500 feet distant. It does not appear that Quinn was at any time informed that the said sketch was to be his working-guide in performing the contract, or that he was at any time instructed to excavate the area of 260 by 130 feet laid down thereon. But it does appear that if he had excavated the whole surface of that area, so as to procure a depth of 14 feet, the quantity of rock excavated would have been more than 3,600 cubic yards, at the stage of water which was found there on the 8th of February, 1868.

VIII. Henry Bacon, a civil engineer, was, in 1867 and 1868,
31 acting under Colonel Wheeler in superintending the improvement of the harbors of Ontonagon, Superior City, and Eagle Harbor, with his headquarters at Ontonagon, ninety miles from Eagle Harbor. His duties at Eagle Harbor were to mark out the work to be done, and superintend its execution. At the time of the letting of the contract to Quinn, Bacon was present in Wheeler's office, and was told by Wheeler that he should be notified when the contractor would be ready to proceed with the work. No such notice was given by Wheeler to Bacon. The latter, supposing that the notice was to come from Quinn, waited for it, and did not go to Eagle Harbor until the 24th of September following. He then went there, but, not finding Quinn there, he remained but a short time. Bacon was again at Eagle Harbor on the 3d of October, but Quinn was not there then. On that day Quinn, at Chicago, addressed a letter to Bacon, at Ontonagon, informing him that he expected to be at Eagle Harbor from the 20th to the 25th of October, which letter was answered by Bacon on the 9th of October, saying that he would endeavor to meet Quinn then. When Bacon wrote that letter he had not received from Colonel Wheeler the plans or chart of Eagle Harbor, but had written to him for them; and he requested Quinn to call at headquarters, and if the plans and instructions had not been sent, to bring them with him. Quinn and Bacon met at Eagle Harbor about the 25th of October. The latter went there to make an inspection and determine the low-water line, the determination of which was necessary in order to fix the depth of excavation requisite to obtain a depth of not less than 14 feet at low water. Bacon and Quinn then conferred in regard to the work to be done. While they were there the weather became boisterous, and so continued for more than three months, during which period of time it was impracticable to do any work under the contract.

IX. Colonel Wheeler held that the way contemplated by the contract for ascertaining the amount of rock excavated and removed was the measurement and computation of the rock in the bed before its excavation, instead of measuring it after its removal, as cord-wood is measured, or then weighing it. The sketch furnished to Quinn, as stated in finding VII, was made in 1865, not for any particular work, but to ascertain the general features of the harbor, and was only approximately correct; not sufficiently correct for the work to be done under this contract. Assuming it to have been correctly made in 1865, it was as accurate a survey as any that could be taken until ice should be formed in the harbor; and no ice was formed there, so as to admit of a more accurate survey, until the last days of January, 1868. In the interview between Quinn and Bacon at Eagle Harbor, in the latter part of October, 1867, Quinn requested that the work should be remeasured, and Bacon acceded to his request, but postponed the measurement because the season for work was over and the stormy season had begun. He made the survey in January and February, 1868, after ice had formed. Between October, 1867, and January and February, 1868, it was not practicable, owing to the boisterous weather, to have made a remeasurement. The remeasurement was completed by Bacon on the 8th of February, 1868. Before this date no complete survey of the work was made under the orders of Colonel Wheeler, nor had any other survey of it been made under any other authority.

X. The estimate, given in the aforesaid advertisement, of about 1,803
cubic yards of rock to be removed, was not based upon any knowledge
which Colonel Wheeler had of Eagle Harbor, nor upon any computation
he had made, but upon an estimate reported by General Rey-
32 nolds to the War Department in 1866, on the basis of a survey
of the harbor, made by him in that year.

In consequence of the discovery, through the survey completed on the 8th of February, 1868, that the quantity of rock which would have to be excavated in an area of 260 by 130 feet would be more than 3,600 instead of 1,803 cubic yards, the width of the area to be excavated was, by Colonel Wheeler's orders, reduced from 130 to 80 feet; and Quinn was instructed by Wheeler to confine his work to the channel as marked out by Bacon, and to the 80 feet in width; and the area of 80 feet in width was located entirely west of the target-line passing through the middle of the area of 260 by 130 feet, as stated in finding VII; the eastern line of the 80 feet being 25 feet west of the target-line, and the western line 40 feet west of the western line of the area of 260 by 130 feet. The excavation of the 80-foot area required the removal of 2,040 cubic yards of rock.

XI. In order to preserve the level of the work, it was necessary that bench-marks should be made on the shore. Two of those marks were made by Bacon when he made the survey in January and February, 1868, and none had been made before that time as guides to the work to be done by Quinn. And it was not till February 8, 1868, that the work was fully laid out on the ground by Bacon.

XII. The weather was such in part of September and October, 1867, that Quinn could have then proceeded with the work; and he was, in September, making preparations to proceed with it. After the 25th of October the weather was such as to make work by him impracticable up to February, 1868.

XIII. Prior to February, 1868, Quinn had made preparations to proceed with the work under the contract, and made some experiments in surface-blasting of the rocks; that is, blasting with powder in boxes or kegs resting on the surface of the rock-bottom; which produced no impression on the rock. Immediately after the 8th of February, 1868, he commenced the work of drilling the rock for blasting with nitro-glycerine, which is the best explosive under water, it having at least six times, perhaps ten to twelve times, the force of ordinary blasting-powder. The holes which he drilled for that mode of blasting were 2 to 2½ inches in diameter, while holes intended for blasting with powder, to be effective for that purpose, should have a diameter of 3 to 6 inches.

XIV. On the 13th of May, 1868, Quinn was paid the contract-price, less 10 per cent. thereof, $580, retained, for 100 cubic yards of rock, removed from the 80-foot area, up to the preceding 15th of April.

Between February 8 and August 19, 1868, he drilled in that area nearly 500 holes, which extended over the whole surface of the area, and each was about 6 inches below the required depth of 14 feet. During a part of that time he worked his hands day and night at the drill-

ing. Had he obtained nitro-glycerine in sufficient quantity, and exploded all of those holes, it would have broken up all the rock required to be excavated to obtain that depth of water over the whole 80-foot area. He made a contract with a company in Ohio for the delivery to him of 1,000 pounds of nitro-glycerine by the last of May, 1868, but the company failed to deliver any. In June following he obtained, at a very heavy cost, from a mining company on Lake Superior, about 60 pounds of that article, and about the 9th of July he exploded fifty-four of the holes; and this was the last explosion of that description that he made. On the 24th of July, 1868, he was paid the contract-price, less ten per cent. thereof, $580, retained, for an additional 100 cubic yards of rock
removed prior to the 16th of that month. On the 3d of August,
33 1868, he went to Ohio to procure an additional supply of nitro-
glycerine, but could not then obtain it. On the 10th of September following he was paid the contract-price, less ten per cent. thereof, $580, retained, for an additional 100 cubic yards of rock removed prior to the 31st of August preceding. After August 19, 1868, the weather did not admit of the further prosecution of the work in that year; and he did not return to Eagle Harbor during the time limited by the contract for the completion of the work.

XV. Up to about the 1st of August, 1868, Colonel Wheeler spoke favorably to Quinn of extending his time, if he was delayed by circumstances beyond his control; and several times between February and August, 1868, Bacon stated to Quinn that he could get an extension if he made good progress in the work. On the 5th of October, 1868, Quinn addressed a letter to Colonel Wheeler, asking for an extension of time for the completion of the work, upon the grounds that the company which had contracted to deliver nitro-glycerine had failed to do so, and that the high winds at Eagle Harbor excluded the spring and fall months from the operative season, leaving the work to be done within the short space of a high northern summer, or on the ice in the winter. He stated that he was then expecting nitro-glycerine from another company; but that, whether it came or not, he would still want the whole of the next summer.

That letter was, on the 6th of October, transmitted by Colonel Wheeler to Major-General Humphreys, commanding the Corps of Engineers, with the statement that he had every reason to believe Quinn's statements to be true, and that if the persons who had contracted to supply the blasting-oil had furnished it, he would have accomplished his work; but Colonel Wheeler refrained from expressing an opinion as to whether the time should be extended or not. On the 19th of October, General Humphreys having directed Colonel Wheeler to give further information, and make some recommendation as to the propriety or impropriety of extending Quinn's contract, Colonel Wheeler answered that he thought it inexpedient to extend the time for the following reasons: 1. That Quinn had been delayed by causes over which he ought to have had control, and by persons from whom he ought to be able to obtain redress; 2. That the work could be done more cheaply than at the price contracted for by Quinn; and, 3. That there was not enough money on hand to complete the work at the price paid Quinn; and that section 3 of an act making appropriations for sundry civil expenses, &c., approved July 25, 1868, forbade any contract which should bind the government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

On the 23d of October, General Humphreys informed Colonel Wheeler that it was not deemed advisable to extend the time of Quinn's contract, and directed him to notify Quinn accordingly.

On the 23d of October, Quinn, having been furnished by Colonel Wheeler with copies of Wheeler's letters of the 6th and 19th of that month to General Humphreys, wrote from Cincinnati, Ohio, to the latter, requesting him to suspend all further action in the premises until he could make an additional showing; which would be done as soon as he could get home to his papers at Chicago.

On the 9th of November following, General Humphreys directed Colonel Wheeler to advertise for proposals for the work at Eagle Habor.

On the 14th of November, Quinn wrote from Cincinnati to General Humphreys, stating that he had not yet been at Chicago, and that Colonel Wheeler had not furnished him with information from his 34 files which he had requested him to furnish, and which he (Quinn) regarded as essential to his showing, and adding, "But the particular object of this letter is to inform you that a sufficient quantity of nitro-glycerine is now ready for me on Lake Erie, and that I will have it forwarded immediately to Eagle Harbor, and with it commence blasting and removing rock, if the government will pay me according to the provisions of the contract for what work I do. But if it will not pay me, then it would be folly in me to incur further expenses. * * * The nitro-glycerine, in fact, has been ready for over two weeks, and would now be at Eagle Harbor had not Colonel Wheeler's very unexpected change of front so very seriously disconcerted my arrangements."

To this letter General Humphreys, on the 18th of November, returned answer as follows: "I have to inform you that Col. J. B. Wheeler, Corps of Engineers, was directed, on the 9th instant, to advertise for proposals for the work at Eagle Harbor. Your contract expired by its own terms on the 31st October, 1868, and you have probably been notified of the fact, and of the decision of these headquarters not to extend it."

XVI. On the 26th of January, 1869, Colonel Wheeler, on behalf of the United States, entered into a contract with George W. Townsend, of Boston, Mass., for doing the work at Eagle Harbor, at the rate of $40 per cubic yard; the work to be commenced on or before the 1st day of May, 1869, and to be completed on or before the 31st of October, 1869.

XVII. If the claimant had been allowed to proceed with the work after the expiration of the period prescribed in the contract for its completion, the profit he would have made upon it would have been fifty-eight thousand six hundred and eighty-two dollars.

Upon the foregoing facts, and those found on the request of parties, the court is equally divided upon the question of the right of the claimant to recover, and it is therefore ordered that his petition be dismissed.

By the court.

(NOTE BY THE COURT).—The court read no opinion in this case.

35 The United States Court of Claims.

DAVID QUINN'S ADMINISTRATOR
vs.
THE UNITED STATES. } No. 5933.

And now comes the claimant by his counsel and moves the court to make the following additional findings, to wit:

I. That the United States has never paid the said Quinn the ten per

cent. retained upon the amount due for the rock removed and set
in finding No. XIV, amounting to the sum of $1,740.

II. That there were at Eagle Harbor and in its immediate vicini
on the 1st of Sept., 1867, sufficient workmen familiar with drilling
blasting rock, and drilling and blasting tools and scows, with which
commence his work and which Quinn could have obtained and
ready and able to obtain.

III. That Quinn invented a housed-raft which is useful in do
36 such work and which he used thereon, and in his experime
upon this work demonstrated that nitro-glycerine was the b
explosive to excavate rocks under water, which invention and discov
are valuable in relation to such work.

IV. That after the 1st of October, 1868, Quinn secured a suffici
quantity of nitro-glycerine to blast the whole of the rock and which
could have got to Eagle Harbor before navigation closed that fall,
gave notice of this fact to the War Department and urged that he be
mitted to complete his contract.

V. That the rock in question at Eagle Harbor could well be blas
and removed in the winter when the harbor was frozen over.

VI. That on the 25th of Nov., 1868, and again on the 5th of Dec., 18
Quinn made further showing to the War Department of his right
complete the work provided in his contract, setting forth among ot
reasons therefor the default of the government in not having
37 work in readiness until the 9th of February, 1868, and the un
treatment he had received from the engineers in charge in r
tion thereto.

VII. That under the circumstances of the work not being prepar
for Mr. Quinn to commence operations until Feb'y 9th, 1868, and of
difficulties encountered from unfavorable weather and other caus
Quinn made reasonable progress with the work.

VIII. That with Quinn's mode of removing the rock with his hous
raft and with nitro-glycerine, and taking into consideration his prepa
tion, tools, rafts, scows and efforts in securing nitro-glycerine, he
performed about ¾ of the work on the unremoved rock by him to
removed.

IX. That Quinn caused the holes which he drilled to be protect
from filling up by plugs placed in them, which could be seen and remov
and the rock blasted with the nitro-glycerine which he had engaged in
fall of 1868, and with it the rock could have been blasted and remov
the whole at an expense not exceeding $20 per cubic yard.

38 X. That by working when work of this kind could be done
Eagle Harbor, and at times in the night, Quinn so far complet
his work that he would have finished it by the 1st of Oct., 1868, had
nitro-glycerine, for which he had contracted, arrived, as he had reas
to suppose it would, in May, 1868.

XI. That the United States suffered no damage by the work not bei
finished within the time named in the contract, and if the work was
be finished as laid out by the government, it would have been as well
the United to have it finished the following season.

XII. That the United States did not make the appropriation expect
when the contract was entered into for this work for the fiscal y
ending on the 1st of July, 1869, and had not sufficient specifically app
priated to pay in full for the work, but that Quinn nevertheless was rea
willing, and anxious to complete his contract.

XIII. That at the time Quinn began to drill, on the ninth
39 Feb'y, 1868, and from time to time to the 13th of Aug., when

completed the drilling of the rock, Quinn had reason to believe, from the statements of the engineer in charge, that under the circumstances the time for doing his work would be extended if necessary, and he then commenced and proceeded with the work under that expectation.

Respectfully submitted.

T. D. LINCOLN,
Counsel for Claimant.

Upon the foregoing requests for additional findings of fact by claimant, the court makes the following, rulings, to wit:

Of the foregoing requests, numbers one, two, and six are allowed; and numbers four, five, seven, eight, ten, eleven, twelve, and thirteen are disallowed; and number three is allowed down to and including the word "thereon;" and number nine is allowed down to and including the word "removed," where it occurs the second time.

By the court.

(Indorsed:) Claimant's request for additional findings. Filed Feb. 21, 1876—J. R.

40 In the Court of Claims of the United States, December term, 1875.

DAVID QUINN'S ADMINISTRATOR
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THE UNITED STATES.
} No. 5933.

And now comes the Attorney-General on behalf of the United States and requests the court to find the following additional facts, viz:

1. That the use of nitro-glycerine was experimental in the years 1867 and 1868.
2. That nitro-glycerine could not be obtained by Quinn in sufficient quantity for blasting purposes during the spring, summer, and fall of 1868.
3. That powder could have been obtained in sufficient quantity for blasting purposes during the existence of the contract.
4. That Quinn had large quantities of powder on hand in 1867 and 1868.

41 5. That the use of gunpowder for blasting purposes was not experimental in 1867 and 1868.

6. That the subsequent contractor used powder to blast the rock in the channel at Eagle Harbor, Michigan.
7. That the very work contracted for by Quinn was performed by the use of gunpowder.
8. That the holes drilled by Quinn and remaining unexploded were of no use to the United States.
9. That the force employed by Quinn left off work in August, 1868.
10. That when Quinn's force left, in August, 1868, Quinn had delayed and was unable to proceed with the work in accordance with the terms of the contract.
11. That Quinn was an experimenter and theorist and incompetent to perform the work in accordance with the terms of the contract.

THOMAS SIMONS,
Assistant Attorney-General.

42 Upon the foregoing requests by the defendants for additional findings of fact, the court makes the following rulings, to wit:

Of the foregoing requests, the third, sixth, seventh, and ninth are allowed; the fourth is allowed with amendment striking out th words "large quantities," and inserting in lieu thereof the words "twent five kegs"; the eig'th is allowed with amendment striking out the wor "of no use to," and inserting in lieu thereof the words "not used by th subsequent contractor or by"; the first, second, fifth, and eleventh ar disallowed, and the tenth is disallowed, with reference to the last sentence of the court's finding XV, as showing the facts.

By the court.

Filed February 12, 1876.

43 In the Court of Claims.

J. W. WALLACE, ADMINISTRATOR OF DAVID Quinn,
vs.
THE UNITED STATES.
} No. 5933.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon; of the application of the solicitor for claimant for the allowance of an appeal, as filed in the clerk's office April 11, 1876, and of the order of the said Court of Claims allowing the same; of the findings of fact by the court and the conclusion of law; of the requests of the claimant and of the defendants for additional findings of fact, and of the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this thirteenth day of April, A. D. 1876.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 110. J. W. Wallace, adm'r of David Quinn, dec'd, appellant, vs. The United States. Court of Claims. Filed 18th April, 1876.

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Supreme Court of the United States.

J. W. WALLACE, Administrator.
vs.
THE UNITED STATES.
No. 110.

APPEAL FROM THE COURT OF CLAIMS.

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Of Counsel for David Quinn.

F. W. Freeman, Printer, S. W. Cor, Third and Walnut.

Supreme Court of the United States.

J. W. WALLACE, Administrator.
vs.
THE UNITED STATES.
} **No. 110.**

APPEAL FROM THE COURT OF CLAIMS.

This was a suit to recover of the United States a sum of money due for work actually done under a contract made with David Quinn, deceased; and for a further amount which said Quinn would have made, had he been permitted to proceed with and finish his contract. The contract related to the deepening and widening the channel of Eagle Harbor, Lake Superior.

On the 10th of July, 1867, the United States advertised for sealed proposals for removing the rock from the channel of said harbor, and in the said advertisement it was stated:

"There are about eighteen hundred and three (1,803) cubic yards of trap rock to be removed, situated in the middle of the entrance, included within an area of two hundred and sixty (260) by one hundred and thirty (130) feet, and in depth of water not less than ten (10) feet."

"This rock must be so removed as to obtain a depth of not less than fourteen (14) feet at low water,"

"The work to be commenced on or before the 1st of Sept., 1867, and finished by October 31st, 1868." *Printed Rec. p.* 6.

Quinn became the successful bidder; the work was awarded to him, and a written contract was executed on the 10th of August, 1867, with bonds, etc.

The written contract expressly refers to, and adopts the advertisements for proposal, in accordance with which the work was to be done, but it provides for the finishing the work by the 1st October instead of the 31st.

The contract also provided that there was to be a United States engineer in charge, and it was provided, that if:

"The contractor shall delay, or be unable to proceed with the work in accordance with the foregoing terms, the engineer officer in charge shall have full right and authority to take away this contract and *employ others to complete the work, deducting the expense from any money that may be due and owing him*, and the contractor will be responsible for any damage caused to others by his delay or non-compliance."

"If the work *proceed satisfactorily, payment shall be made, from time to time, on the sections where the required depth shall be obtained, reserving ten per cent.* from the payment until the whole shall have been completed and accepted." *Record, p.* 14.

The "terms" referred to above were thus stated in the contract:

"That the said David Quinn, of Chicago, Illinois, shall remove the rock at the entrance of the harbor at Eagle Harbor, Michigan, and deposit it at such point *as the engineer in charge may direct*; the said Quinn furnishing all labor, boats, machinery, and appliances of every description, necessary to remove the rock, so as to obtain not less than fourteen (14) feet at low water, *in conformity with the terms proposed in the advertisement inviting proposals for the improvement* of Eagle Harbor, Lake Superior." *Record, p.* 14.

In conformity to this agreement, Quinn proceeded to

Eagle Harbor on the 29th of August following, and was there, ready to begin, for more than three weeks, and waiting for the engineer of the United States to lay out the work, but found no one there. On his arrival he proceeded at once to make tools and obtain workmen, and had tools and workmen ready to commence on the 1st of September, but the engineer of the United States not making his appearance, he was not able to do anything, for the reason that the work was not laid out by the engineer. The engineer did not arrive at Eagle Harbor until the 25th, but was then unable to lay out the work, for the reason that he had not the plans or chart of Eagle Harbor. *Printed Record, p.* 16, (*VIII.*)

No survey or laying out the work was, in fact, made by the engineer until the 8th of February, 1868. The court expressly finds:

"That there was, at Eagle Harbor and in its immediate vicinity, on the 1st of September, 1867, sufficient workmen familiar with drilling and blasting rock, and drilling and blasting tools and scows with which to commence his work, and which *Quinn could have obtained, and was ready and able to obtain.*" *Printed Record, p.* 20, (*II.*)

Quinn, before the letting, had seen a sketch of the harbor, but this sketch was not made for the work in question and was not sufficiently accurate for the work to be done under the contract; this is expressly found. *Printed Record, p.* 16, (*IX.*)

There were no buoys or marks ascertaining accurately the channel, and it could not be ascertained by soundings, but could be found from the sketch by *means of engineers' instruments.* It could not be paced or measured off. This is also found. *Printed Record, pp.* 15, 16. (*VII.*)

The ascertainment and the fixing bench marks was necessary for the work by the engineer, and yet none was fixed until February 8th, 1868. This is also found. *Printed Record, p.* 17. (*XI.*)

But a greater difficulty presented itself. The channel to be excavated of 260 by 130 feet, was found to contain not "about 1,803 cubic yards," but more than 3,600 cubic yards—3,619 cubic yards. This is also directly found. *Printed Record, pp* 16 *&* 17. (*VII & X.*)

And when the channel was in fact laid off, it could not be laid off in the middle of the natural channel, one half on each side the range line; and there was, therefore, no means of Quinn ascertaining where this 1,803 cubic yards were to be excavated. And when Bacon, the engineer, arrived he laid off 80 feet instead of 130, and this on one side of the range line; and directed Quinn to confine his excavations to that. Even then the area to be excavated contained 2,040 cubic yards. This is found. *Printed Record, p.* 17, (*X.*)

Nothing could therefore in fact be done by Quinn, until all the above particulars were ascertained and prepared by the United States, and all these were left undone by the neglect or fault of the defendant, and Quinn was thereby necessarily delayed in his work till February 8th, 1868.

It was the duty of the Government engineer to mark out the channel and superintend the work under the contract. *Printed Record, page* 16. (*VIII.*)

That Quinn worked with due diligence after he commenced is evident from the fact that he was paid installments upon his contract, which by the contract were only payable unless "the work proceeded satisfactorily." *See Contract, Printed Record, p.* 14.

The court expressly find that he drilled, in the area to be excavated, 500 holes, and that during a part of the time he "worked his hands day and night at drilling," and that "had he obtained nitro-glycerine in sufficient quantity and exploded all those holes, it would have broken up all the rock required to be excavated over the whole 80 feet area." *Printed Record, pp.* 17, 18, (*XIV.*)

Owing to the delay of the Government in having the work prepared in due time, it was difficult, if not impossible, for Quinn to finish the work within the time named in the contract; and by the failure of the company that was to furnish him his nitro-glycerine, he was unable to blast the holes as drilled. He drilled the whole rock for the excavation, but only blasted say some 300 yards. The court expressly finds that the holes were sufficient for the blasting all the rock the required fourteen feet below low water mark, over the whole 80 yards to which he was confined. *Record, pp.* 17, 18, (*XIV.*)

During the progress of the work, the government engineer encouraged Quinn in the idea that his contract would be extended if he was not able to complete it by circumstances beyond his control, and that he made good progress with the same. *Printed Record, p.* 18, (*XV.*) Time was not in fact of the essence of the contract.

In the following season, Quinn desired to proceed with his work and to finish it, but the engineer refused, and let the work to another party to be done at $40 per cubic yard, giving the following reasons for the refusal, to-wit:

1. "That Quinn had been delayed by causes over which he ought to have had control, and by persons from whom he ought to be able to obtain redress."

Before the work could be commenced, the following things were necessary to be done by the United States:

First. An engineer must be there to superintend the work and direct where the broken rock should be placed. *See the contract, record p.* 14, (*III.*)

Second. It was necessary that the engineer should lay out the channel for the excavations to be made, as the survey previously made was not sufficiently accurate for work under the contract. *Record pp.* 16, 17, (*VIII, IX, X.*)

Third. Bench marks were necessary to be established on the shore in order to preserve the level of the work. *Record p.* 17, (*XI.*)

Fourth. There was in the centre of the channel over 3,600 cubic yards (3,619) of rock to be removed to get the required depth of fourteen feet within the area of 260 by 130 feet. And the engineer, when he had ascertained this fact, laid out the channel to be excavated but eighty feet wide, and placed that, not in the centre of the channel, but one side of the same. *Record p.* 17, (*X.*)

Neither of these things was provided or done before the 8th of February, 1868, five months and eight days after the 1st of September, when all should have been prepared and the work begun, and the work could not have been begun before that time.

FIRST.

The United States being first in fault by not having the work ready on the 1st of September, 1867, can not insist upon its completion by October 1st, 1868.

It was the duty of the United States to have the channel carefully laid off, so that the claimant could commence work on the 1st of September, 1867; this is implied in the contract. The bidders had a right to *suppose the work was then ready.* Besides, there was ample time after the letting and before the 1st of September, to have made all ready.

Allamon v. *Mayor & Ald.*, 43 Barb., 36, 37.
The United States v. *Speed*, 8 Wall., 84.
Hudson Canal Co. v. *Penn. Coal Co.*, 8 Wall., 288, 289.
Shute v. *Hamilton*, 3 Daly, 466.
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Russell v. *Da Bandeira*, 13 Com. B. N. S., 203.
Niblo v. *Biusse*, 38 N. Y. R., (Keyes), 479.
Van Buskirk v. *Stow*, 42 Barb., 15.
Van Buren v. *Digges*, 11 How., 479, 480.
Richard v. *Blackstone*, 102 Mass., 343.
Phil., Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 341, 342

The contract provides that Quinn shall remove the rock, "*and deposit it at such points as the engineer in charge may direct*" in conformity to the proposals, which required the "*removing of the rock and depositing in such places as may be indicated.*"

This was of great importance to the United States, under the plan of the improvement, with reference to filling the contemplated crib to be built at the entrance of Eagle Harbor, and required the engineer to be there on the 1st of September.

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied, was plainly expressed * * * * as when the act to be done by one of the contracting parties, can only be done upon something of a corresponding character being done by the opposite party. The law in such a case, if the contract is so found that it binds the party contracting to do the act, will imply a co-relative obligation on the part of the other party to do what is necessary on his part, to enable the party so contracting to accomplish his undertaking and fulfill his contract." 8 *Wall.*, 288, 289.

"The contract says the contractor is to place earth not wanted for embankment 'where ordered by the engineer.' He can rightfully place it nowhere *until ordered by the engineer*, and if such an order was refused *or delayed*, and the contractor was thereby injured, he had a clear right to damages. It can not be supposed such an order was to be given or obeyed if obedience to it would be a trespass. Before giving it, the company was bound to make it a lawful order, the execution of which would not subject the parties to damages for a wrong, *and therefore was bound to provide a place, and of course a reasonable convenient place, as well as seasonably to give the order.*" 13 *How.*, 341, 342.

For similar statements of the law upon this point, see the other cases cited above, and especially the following:

Van Buren v. *Digges*, 11 How., 479, 480.

Blanchard v. *Blackstone*, 102 Mass., 347, 348.

2 *Parsons on Contracts*, *p.* 39.

The United States v. *Speed*, 8 Wall., 84.

3. "The agreement did not fix the spot upon which the building was to be erected. It was therefore the duty of the town to furnish a place. If the town unreasonably omitted to perform this duty, it is as much a hindering and preventing of

the performance of the agreement by the plaintiff, as the town had expressly refused to select a place, or had done an affirmative act to interrupt his performance of the agreement."

4. "The vote authorizing the selectmen to erect the building for the use of the town, necessarily involved an authority to select a place for the building, as well as to make a contract for its erection." 102 *Mass.*, 347, 348.

Holme v. *Guppy*, was a case where the plaintiffs agreed in writing to do the carpenter work in a brewery for 1,700£ within the space of four and a half months after the date of the agreement, or forfeit 40£ per week to be deducted as liquidated damages. The plaintiffs were not able to give defendants possession of the brewery for work for four weeks, and they did not get the work done within the time by four weeks. They were detained one week by their own fault, and four weeks by the default of the masons employed by the defendants. Defendants claimed the deduction of 160£.

A verdict was taken for the plaintiffs for 200£, with leave to move to reduce it to 160£ or enter a non-suit. Rule *nisi* for such reduction having been obtained, the case was argued.

Parke, B. gave the opinion:

"On looking into the facts of the case, we think no deduction ought to be allowed to the defendants. It is clear from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a *given* four months and a half, and the particular time is extremely material, because they probably would not have entered into the contract unless they had these four months and a half within which they could work a greater number of hours a day. Then it appears that they were disabled by the acts of the defendant from the performance of *that* contract, and there are clear authorities that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default. It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the contract, and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half, ending at later period. The plaintiffs were therefore left at large; consequently they are not to forfeit anything by the delay." 3 *Mes. & Wels.*, 369.

The above case is very applicable to the case before the court, in considering the contingencies that might from time to time interfere with the progress of the work, and the necessity that they be ready at all times to take advantage of favorable occasions to do the work.

"Without entering into a description of the general doctrine of the implication of mutual covenants, we deem it sufficient to say, that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do, to enable plaintiffs to comply with their promise or covenant." 8 *Wall.*, 84.

As the contract required that Quinn should commence his work by the 1st of September, and complete it by 1st of October of the next year, and as it was certain that the party could not work more than about one-fourth the days of the year, and very uncertain when these days would be, these facts are important in this regard.

The work to be done was the excavation of a channel 260 feet long and 130 feet wide, so that there would be a channel 14 feet deep. And this excavation was to be about 1,803 feet of rock; this is all clearly provided for in the contract. But this 130 feet by 260 is not definitely ascertained by the contract, nor does the contract provide the means of ascertaining it definitely *enough for working it;* and until ascertained, from and after the first of September, 1867, the United States were in default.

Blanchard v. *Blackstone*, 102 Mass., 347.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How. 338.

SECOND.

The target range not set out as the guide and could not be followed.

The target range was not set out in the contract as the guide; nor was there any 130 feet by 260 to be found there, which to excavate so as to provide a channel 14 feet deep, which would make "about 1,803 cubic yards" of rock. On the contrary, to have excavated 130 feet in length, 65 feet on each side of the target line, would have required an excavation of 3,619 cubic yards—a thing not contemplated by the advertisement or the contract.

THIRD.

The claimant could not properly commence his work till the engineer appeared, laid down the channel, and fixed a bench mark, etc.

The claimant could not have found the channel and gone to work by the target range, for the following reasons:

1st. Neither the contract nor the advertisement called for the target range.

2d. There was to be an engineer in charge of the work.

3rd. The rock was to be deposited at such places as the engineer in charge should direct—the contract so provides.

Phil., Wil. & Bal. R. **R**. *Co.* v. *Howard*, 13 How. 341, 342.

4th. With all such works it is usual to have an engineer in charge. This contract everywhere foreshadows that idea.

5th. There was nothing there which would definitely ascertain the channel to be excavated. It required engineers' instruments to ascertain this definitely for working. The court have so found. *Record, pp.* 15, 16. (*VII, VIII, IX.*)

6th. Rock to be blasted and removed under water at $58 per cubic square yard, was not to be removed anywhere —its precise location was to be fixed. And this required a careful laying down the channel by the instruments used in the engineers' department. This is the finding of the court. *Record, pp.* 15, 16. (*VII, VIII.*)

Blanchard v. *Blackstone*, 102 Mass., 347.

Roberts v. *Bingham*, 5 B. L. R., (C. P.) 325, 326.

FOURTH.

The United States can not insist upon the work being finished by the 1st of October, 1868.

The work not having been ready on the 1st of September, 1867, for the commencement of the contractor, the United States are not in any position to insist upon the job being finished by the 1st of October, 1868.

Phil. Wil. & Bal. R. R. Co. v *Howard*, 13 How., 336.

Green v. *Haines*, 1 Hilton, 255.

Shute v. *Hamilton*, 3 Daly, 466.
Meehan v. *Williams*, 2 Daly, 374.
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Blanchard v. *Blackstone*, 102 Mass., 343.

In the case of *Green* v. *Haines et al.* the court say:

"It was shown by the testimony of several witnesses, that the specifications had been departed from by the directions of the defendants. This excuses performance within the time agreed upon, and the obligation thereafter is to complete the work within a reasonable time. It was shown, moreover, that the work was delayed through the act of the defendants in delaying to remove a certain stairway."

"By the contract, the work was to be finished by the 15th of October. It was not finished until about the 1st of November, according to the plaintiff's witness, or about the 15th of November, according to the defendants' witness. Whether this was completing the work within a reasonable time, was a question for the referee upon the evidence." 1 *Hilton, R.* (*N. Y.*) 255.

In the case of *Chute* v. *Hamilton*, the court say:

"Thus, where one contracts to have work done for him, omits to do something on his part which is essential before the work can be began or carried on, and by which the other party is delayed, (*Holme* v. *Guppy*, 3 *Mes. & Wels.*, 386; *Allamon* v. *The Mayor, etc. of Albany*, 43 *Barb.*, 33); or where an agreement is afterwards made for extra work or for a change in the plan, which produces delay, (*VanBuskirk* v. *Stow*, 42 *Barb.*, 9; *Russell* v. *Da Bandeira*, 13 *Com. B. N. S.*, 148); or where the one for whom the work is to be done is prevented from doing what was essential on his part through the happening of a casualty, (*Niblo* v. *Binsse*, 1 *Keyes*, 476,) the strict condition in respect to time is waived, and the party who is to do the work is allowed a reasonable time thereafter within which to complete it. (*Green* v. *Haines*, 1 *Hilt.*, 254; *Meehan* v. *Williams*, 2 *Daly.*, 367)."—3 *Daly. R.*, (*N. Y.*) 466.

FIFTH.

The United States not justified under the agreement in refusing to permit Quinn to finish his work.

The United States being in fault in not getting the work ready till the 8th of February, could not insist upon the work being completed by the 1st of October; and, therefore, were not justified in refusing to let Mr. Quinn complete the work. He was entitled to the whole time to do the work, in as economical a manner as possible—the nature of the work shows it.

Van Buskirk v. *Stow*, 42 Barb., 15.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 338, 339.
Dubois v. *Del. Hud. Ca. Co.*, 4 Wend., 290, 291.
Van Buren v. *Digges*, 11 How., 470, 480.
Holme v. *Guppy*, 3 Mes. & Wels., 380.

SIXTH.

The completion of the work by the 1st of October was not a condition precedent under the contract.

The completion of the job by the 1st of October, was not a condition precedent to a recovery or a right to proceed therewith under the circumstances.

This was an independant covenant, and only gave the United States a right to damages, if any they had suffered.

Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 338, 339.

Van Buren v. *Digges*, 11 How., 479, 480.
2 *Parsons on Contracts*, p. 39.
Franklin v. *Miller*, 4 Ad. & El., 605.

"The question is, whether the covenant to pay is dependent on the covenant to finish the work by the 1st of November. So far as respects each monthly installment, earned before November, it is clear the covenants are dependent * * * * We do not deem it needful to review the numerous authorities, because we hold the general principle to be, that covenants are to be considered dependent or independent, according to the intention of the whole instrument, and in this case we find no difficulty in arriving at the conclusion that the covenants were throughout independent. There are in the instrument no terms which import a condition, or expressly make one of these covenants dependent upon another. There is no necessary dependency between them, as the pay for work done may be made, though the work be done after the day."

"*The failure to perform on the day, does not go to the whole consideration of the contract, and there is no rational connection between the amount to be paid after the day, and the injury or loss inflicted by a failure to perform on the day.*" 13 How., 338, 339.

The case shows that the United States suffered no damage by the delay. No damage is found.

"It is a clearly recognized principle, that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." *Franklin* v. *Mill*, 4 Ad. & El., 605.

In a late case, *Beltini* v. *Gye*, Blackburn, J., says:

"We think we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendants have stipulated for; or whether it merely partially affects it and may be compensated in damages. According as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent." *L. R.*, 1 *Q. B. Div.* 188.

This contract does not in any of its features express or imply that the finishing the work on or before the 1st of October, was a condition precedent. Nothing in it, nor in the character of the work, tends to make it so.

If the United States suffered any damage by the delay, then it was a question of proof, in which the damage caused by the United States herself, by the delay and neglect, would come into view. If Quinn did cause damage by his inability to finish his contract by the 1st of October, then it should be made up to the Government, though his delay was caused by the failure of third persons to furnish nitro-glycerine as agreed upon. No damage of the kind is found or was ever claimed.

Time is not generally of the essence of the contract, except where it is expressly so stipulated.

King v. *Ruckner*, 21 N. J. Eq., 604.
Grigg v. *Landis*, 21 N. J. Eq., 495.

There is no stipulation making the completion of the work on the 1st of October a condition precedent; much less is there anything in the nature of the work to be done, but there are many things to the contrary.

Where is there any suggestion of forfeiture, or anything more than the right, if delay is caused or inability to proceed appears, to take away the contract and finish the work at

Quinn's expense, deducting the same from what becomes his due under the contract?

SEVENTH.

The reasons given by the United States' officers for preventing Quinn from completing his work were not valid or satisfactory.

In this connection the court will bear in mind that the reasons given for not permitting Quinn to finish his contract, have no relation to his not having performed a reasonable amount of it during the season, under the circumstances.

They are these. I quote them.

1st. "Mr. Quinn has been delayed by causes over which he ought to have had control, *or from which he ought to be able to obtain redress.*"

2nd. "The work can be done more cheaply than at the price contracted for by Mr. Quinn."

3rd. "There was not enough money on hand to complete the work at the price paid Mr. Quinn, and section 3 of an act making appropriations for sundry civil expenses, etc., approved July 25, 1868, forbids any contract which binds the Government to pay a larger sum of money than the amount in the treasury appropriated for the specific purpose." *Record, p.* 18. (*XV.*)

The fallacy of all this is evident, for it was only in case the contractor should delay or be unable to complete the work that the engineer had a right to take it from him.

It will be observed that it was not upon this ground that the refusal was based. And, under the circumstances, this clause of the contract can not be used against him, because of the delay and default of the United States.

But the reasons for this action will not bear examination upon other grounds.

1st. As to Quinn's remedies against the company that furnished the nitro-glycerine, the United States had nothing to do with them, and they would have turned out fruitless as the company failed.

2nd. After the delay of the United States, it was hardly fair to refuse to permit him to finish the job, and especially as it was his experiments that showed that it could be done for less than the contract price. The court will observe that the estimate of the engineer was very much larger than Quinn's bid—and so were all the responsible bids.—*Reynolds' report on improvement of Eagle Harbor to Major General Humphreys.* His estimate was $81. per cubic yard. This appears among the public documents which were in proof and may be referred to here, being public documents published by authority of Congress.

This reason would seem to be a sufficient one for permitting him to finish his work.

3rd. The act of July 25th, 1868, certainly stood in the way of a new contract, but did not stand in the way of one executed under a system of laws which made it valid.

A sufficient number of holes were drilled to have blasted all the rock. *Record, pp.* 17, 18. (*XIV.*)

This had been done by working night and day, and except for the failure of the company that was to furnish him with the nitro-glycerine in May, 1868, he might, by working night and day, have finished it before the storms set in in August.

EIGHTH.

But the United States had no right to take away the job for any such reasons as these given.

This is clear from the contract, and when taken from Quinn it was to be in order to an early completion of it, *for his benefit.*

The contract provides that:

"The engineer shall have full right and authority to take away the contract, *and employ others to complete the work, deducting the expenses from any money that may be due and owing him*, and the contractor will be responsible for any damages caused to others by delay or non-compliance. *Record, p.* 14.

This shows, that if taken from the contractor, it must be properly proceeded with and completed, and Quinn was to have the benefit of any lessened prices.

Instead of the statute of July 1st, 1868, being in favor of a defense, it deprives the defense of all its force. It might be a good reason why no future contracts of the kind should be made, but no reason why his contract should be violated and he forbidden to complete a job so nearly finished, and all his work thereon thrown away. *See specially*.

Jones v. *Judd*, 4 Coms., 412.

Hillyard v. *M. Ben. L. Ins. Co.*, 35 N. J. R. (6 Vroom, 423)

NINTH.

To authorize the engineer to take away the contract, he must show that Quinn was not proceeding according to its terms.

It is claimed, however, that the engineer had the right to take away the contract or refuse to permit its completion, without any showing of delay on Quinn's part or of his being unable to complete the work in due time, and even though the United States herself was the cause of most of the delay. Sundry cases, as to the power of the engineer, are referred to as establishing that point. They are:

Ranger v. *Great Western R. W. Co.*, 27 E. L. & E., 35.
Phil. Wil. & Bal. R. R. Co, v. *Howard*, 13 How., 307.
Culbertson v. *Ellis*, 6 McLean, 248.
Kidwell v. *Bal. & O. R. R. Co.*, 11 Wall., 676.
Maloney v. *Malcolm*, 31 Mo. 45.
Harrick v. *Belknap's Est.*, 27 Vem., 679.
Gibbons v. *The United States*, 8 Wall., 274.
Monongahela Nav. Co. v. *Fenton*, 4 W. & S., 210.
Howard v. *All. Valley R. R. Co.*, 69 Penn., 492.
Reynolds v. *Caldwell*, 51 Penn., 305, 306.
O'Reily v. *Kerns*, 52 Penn., 217, 218.

These cases establish the rule that parties may agree to submit questions relating to great public works to the judgment of the engineer in charge in such way as to prevent their appealing to the ordinary tribunals, at least in the first instance, and may authorize the engineer to declare the contract abandoned.

But such agreement must be clearly expressed, and it cannot be enlarged by construction or carried beyond the clearly expressed terms of the stipulation found in the agreement.

Roberts v. *Bury Commissioners*, 5 B. L. R. C. P., 326.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340.

It is an agreement to give one of the parties to a contract the decision of all questions arising under it, and practically to deprive the other party of any remedy in contravention of such decision.

In the case of *Ranger* v. *the Great Western Railway Co.*, cited by the learned counsel, the LORD CHANCELLOR CRANWORTH says:

"When it is stipulated that certain questions shall be decided by the engineer appointed by the company, that is in fact a stipulation that they shall be decided by the company." 27 *E. L. & E.*, 46.

No contract of that character will be extended by construction, beyond the clearly expressed terms thereof, and in all the cases cited by the learned counsel, the terms of the contract are thus clearly expressed. In no one of the cases is there anything made out by construction or argument in favor of any such authority.

In the case of *Smith* v. *B. O. & M. R. R.*, cited, the court held that a contract which would authorize one party to decide matters in dispute, would not be legal and binding. 36 *N. H.*, 490.

In the case of *McMahon* v. *New York and Erie Railroad Company*, also cited by the learned counsel, the court set aside the award of the engineer, because he had not notified the contractor to be present at the making up of the account. 20 *N. Y.*, 467.

The court there held that the engineer's position was that of an arbitrator, and that he must notify the contractor, and that he could not proceed *ex parte* to make up the account to be certified.

In the case of *Kamp* v. *Rose*, 1 Giffard, the court held, that if there was anything whatsoever, that in the slightest degree might effect the entire fairness and impartiality of the architect who had like powers, if there could be the slightest taint, as effecting his position, equity would interfere.

Substantially the same rule was laid down in the case of *Pawley* v. *Turnbull*, 3 Giffard, 82, 84.

In *Lauman* v. *Young*, the Supreme Court of Pennsylvania, speaking upon this point, says:

"The intention of the parties to this prospective submission is very clearly apparent, and is certainly not to be enlarged beyond the plain terms used." 7 *Casey*, 309.

Further on, in the same opinion, the court say:

"The right of trial by jury will not be taken away by implication in any case." 7 *Casey*, 310.

To the same effect is the reasoning of this court in *Phil. Wil. & Bal. R. R. Co.* v. *Howard*, 13 How., 340.

That the power of the engineer appointed by one party in this regard, would be confined to the clearly expressed provision of the contract. This is shown in the late case of *Rogers* v. *The Bury Commissioners*, 5 B. L. R. (Com. Pleas), 326. In that case KELLY, C. B., in giving the opinion of himself, BLACKBURN & MILLER says:

> We agree that, if the parties have so contracted, the court can not inquire whether this is a prudent engagement on the part of the contractor, but we think that where the effect of giving such a construction to the contract, would apparently be to put one party completely at the mercy of the other, we ought to give that construction to the contract, unless the intention is pretty clearly expressed. It is not to be inferred that the one party meant to bind himself so very stringently unless it is so stated; and the commissioners ought to take

care to select words which the contractor could not misapprehend, if such was their object." 5 *B. L. R., C. P.* 326, 327.

The case last named should be carefully studied as to its bearing upon this question and this case.

That was a case for the erection of buildings for the Commissioners of Bury, according to certain plans and drawings, the whole to be completed for a given sum by a day named. The following was the 27th condition of the contract:

"27. That it shall be lawful for the burial board, in case the contractor shall fail in the due performance of any part of his undertaking, or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his creditors for the settlement of their debts, or shall carry on, or propose to carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall not, in the opinion and according to the determination of the architect, exercise due diligence, and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the said works, and of the plant, tools and materials of the contractor, and use or sell the same as the absolute property of the burial board." 27 *E. L. & E.*, 313.

The 28th clause of the contract provided that the commissioners, in case of the determination of the contract as provided in the clause 27, might engage workmen and provide materials for the work and ascertain their value, &c.

The 29th clause provided that in case of delay beyond the time mentioned for performance, the architect was to be charged £1 per day as liquidated damages.

The 34th clause provided that all doubts, disputes and differences arising, concerning the said buildings or any of them, the same should be determined by the architect, who would not be required to answer any questions or show how he made up his award, &c.

The 36th clause provided for the completion of the whole work by a day named, to-wit: the 2nd of October, 1868.

The defendants by their third plea, set up that the plaintiff failed to perform his undertaking, and according to the determination, and within the meaning of the 27th clause of the agreement, exercise due diligence and make such progress as provided for in the 27th clause aforesaid.

To this plea the plaintiff replied:

"That the alleged failure of the plaintiff in that plea mentioned, and the non-exercise by the plaintiff of such due diligence as therein mentioned, and the not making by the plaintiff of such due progress as therein mentioned, were caused and occasioned by delay and default in the defendants, and the architect in supplying plans and drawings, and delay and default of the defendants and their architect in setting out the lands and defining the roads, and giving such particulars as would enable the contractor to continue the specified works and not otherwise." 5 *B. L. R.* (*C. P.*,) 311, 314.

The defendants by their second rejoinder allege:

"That the non-exercise of the plaintiff of such diligence as therein mentioned, and the not making of such due progress as therein mentioned, were not *in the opinion and according to the determination of the architect* caused and occasioned by the acts and orders or by the neglects, defaults and hinderances of the defendants or their architect." 5 **B. L. R.** (*C. P.*) 311.

And in the third rejoinder they repeat the allegations of the second rejoinder and add:

"That the said opinion and determination of the architect were formed and arrived at upon and after due, reasonable, proper and bonafide consideration of the facts and circumstances relating to such failure and non-exercise of due diligence." 5 *B. L. R.* (*C. P.*,) 310, 311.

Upon demurrer the court, exchequer chamber, held that the third replication was good in substance, and the second and third rejoinders thereto were bad.

Among other things, the court say:

"The contractor, if he so pleased, might bind himself to execute whatever the architect might require before the 2nd of October, 1868; but, unless the intention so to bind appears, the implied contract would be, that he should have a further reasonable time to execute such additional works as might be required. No question, however, is now raised as to any extra works ordered; and it is therefore unnecessary to express any opinion as to what the contract is as to those."

"The contractor, also, from the nature of the works, could not begin his work *until the commissioners and their architect had supplied plans and set out the land and given the necessary particulars;* and therefore in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and if they broke that implied contract, *the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract;* for it is a principle, very well established at common law, that no person can take advantage of the non-fulfillment of a condition, the performance of which has been hindered by himself; *see Com. Dig. Condition* (4); and also that he can not sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to, for the breach of the contract to him, would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the present, in the cases of *Holme* v. *Guppy*, (1); *Russell* v. *Da Bandeira*, (2); *and Westwood* v. *Secretary of State for India*, (3); which were cited by Mr. Manisty on the argument in the court below, and also before us. And we do not understand the court of Common Pleas to question these principles, or the authority of these decisions."

"But it is obvious, that under a contract containing such stipulations, it would be very unlikely that the stipulation requiring the works to be completed by a particular day should be effectual; and in prudence the parties might make stipulations to fix and ascertain the additional time to be allowed, without leaving it open to a jury to determine what is reasonable." *British Law Reports*, Vol. V, 325, 326.

This case and the above quotation touch the very marrow of the case before the court.

It shows, that except where so expressly provided, the opinion of the engineer is not binding.

It also shows that the defendants not having prepared the work for Quinn, so that he could proceed before the 8th of February, 1868, were not in any condition to require him to complete the work by the first of October, at the risk of the loss of his contract and of all he had done under it.

It is to the same effect as *Phil. Wil. & Bal. R. R. Co.* v. *Howard*, 13 How., 340, 342; and of *Van Buren* v. *Digges*, 11 How., 477.

Much less were they in any condition to take away his contract, and forfeit his rights thereunder, because it was not completed by that day.

The expression in *Reynolds* v. *Caldwell*, 51 Penn., 308, that even the mistake or fraud of the engineer in making up the certificate would not give the contractor any right of redress in court, must be confined to the facts of that case.

Such a rule is expressly denied in the case of *Starky* v. *De Graff*, 22 Minn., 435.

And it is believed to be inconsistent with the cases generally.

Ranger v. *the Great West. Railway Co.*, 26 E. L. & E. R. 55.
Smith v. *B. C. & M. R. R. Co.*, 36 N. H., 487.
Mc Mahon v. *N. Y. & E. R. R. Co.*, 20 N. Y. R., 487.
M. Nav. Co. v. *Fenton*, 4 W. & S., 211.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340.
Van Buren v. *Digges*, 11 How., 447.

TENTH.

The contract between the parties in this case did not authorize the engineer to take the contract from Quinn

The cases before referred to established the above principles.

Roberts v. *the Bury Coms.*, 5 B. L. R. C. P.
Ranger v. *the Great West. R. R. Co.*, 27 Eng. L. & E.
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 338, 339.
Van Buren v. *Digges*, 11 How., 477.

The contract only authorized the engineer to take away the contract if the contractor should delay or be unable to proceed with the work in accordance with the terms of the contract.

This depended upon the fact, and not upon the judgment or opinion of the engineer. The contract does not read as most of the contracts of the kind do, that "if in the judgment or opinion of the engineer" the party does not proceed, etc, thus placing the whole directly upon the judgment and opinion of the engineer. *See the case last quoted from.*

The case in this respect is somewhat like that of *Ranger* v. *the Great Western Railway Co.* In that case the clause was this:

"That if the appellant should become insolvent, or should from any cause not arising from the act of the company be delayed in completing the works, or would not proceed in the works to the satisfaction of the company, it should be lawful for the company to give notice in writing to the appellant, either under their common seal or under the hands of two directors, requiring him to proceed regularly with the works, and that in case, after such notice he should for seven days make default in regularly proceeding, it should be lawful for the company to employ any other workmen, by contract or by measure and value, or otherwise, to complete the works, and to pay for the same out of the money then due to the appellant." *27 Eng. L & E., p.* 39.

The court say:

"But when the notice was given, their right to act on it depended, not on their view of the appellants' conduct, not on the question whether they were or were not satisfied with him, but on the fact whether, after receipt of the notice, he did or did not for seven days make default in regularly proceeding with the works. This being the nature of the right, the question becomes one of fact. and the respondents having given the notice required by the deed, was the appellants' conduct, after receipt of the notice, such as to justify the respondents in what they did? They must in order to sustain the validity of their acts, establish, as a matter of fact, that the appellant did for seven days after receipt of the notice, make default in proceeding regularly, which I take it, means proceeding with reasonable skill and diligence in the prosecution of the works." 27 *Eng. L. & E., p.* 35.

In the case of *Roberts* v. *Bury Coms.*, the court say:

"It is to be observed that in the recital with which this condition begins, no distinction is made between delays arising from additions which are authorized by the contract, delays arising from unusual inclemency of the weather, (a risk which the contractor has taken on himself, though it might give rise to a claim in misericordian,) and delays arising from breaches of contract or alleged breaches of contract on the part of the commissioners, for which the contractor would have a right to recover damages; in either case it is provided that 'it shall be lawful' for the architect to grant an extension of time, but it is neither said that the architect must give it, which in case the delay was from the inclemency of the weather would not be reasonable, nor that the contractor must accept whatever extension of time the architect is pleased to give in full satisfaction of his claim for damages, which, if the delay from the fault of the commissioners was great and the damages consequently heavy, might be very unreasonable." * * *

"It seems to us that the meaning of the condition is, that the architect shall have authority to bind the commissioners by granting an extention of time; and that if he does so bind them and the contractor accepts it, it shall be taken as full compensation for any damages sustained. If more was intended, which however we cannot think, it seems to us clear that it has not been expressed; at all events there is nothing stipulating that the contractor shall have no remedy for any breach of contract on the part of the commissioners, where the architect has not thought fit to extend the time." 5 *B. L. R.* (*C. P.*,) 327.

There is nothing in the finding that the engineer was of the opinion that Quinn had not commenced and proceeded according to the terms of the contract. Nor is there any finding that he took the contract from Quinn, or refused to let him complete it, because he was not so proceeding. This would be inconsistent with the action of the engineer in paying for rock excavated, and with the other findings of the court.

It is to be observed, that there is nothing in this contract providing that the opinion of the engineer, that the contractor is not proceeding according to the terms of the contract, is to govern or conclude the parties. The engineer had the right to take away the contract only if the fact exists authorizing it, and as the parties have not agreed that his opinion or finding is to be conclusive, it cannot be so held. In case of dispute, the question is one to be proved by the party who sets up the the fact, or by the defendant here. The fact, therefore, that the engineer did refuse to permit the contractor to proceed, does not stand in his way, but is in the way of the defendant, provided the plaintiff can give any legal excuse for not having the whole work completed by the 1st of October, 1868.

Now, the excuse is at hand, and is traced directly to the fault of the Government. As before shown, the contractor could not proceed on the 1st of September "according to the terms of the contract," for several reasons:

1. The United States had no engineer there to direct where to excavate or where to place the excavated rock.

2. The United States had not laid out the channel where the work was to be done, and this was very material, because of the mistake made in reference to the channel in the contract.

3. There was no bench mark fixed by the United States, by reference to which the work was to be done.

4. The work was not prepared by the United States till February 8th, 1868, more than five months after the 1st of September, 1867.

These things relieve Quinn from the necessity of finishing the work by the 1st of October, 1868.

Phil., Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340.
Van Buren v. *Digges*, 11 How., 477.
Shute v. *Hamilton*, 3 Daly, 466.
Russell v. *Da Bandeira*, 13 Com. B. N. S, 202, 203, 204.
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Roberts v. *Bury Coms.*, 5 B. L. R. (C. P.,) 327.

The court has not found that Quinn has not proceeded in accordance with his contract. On the contrary they have found that he proceeded to Eagle Harbor on the 29th of August, and was ready and with means to commence and proceed on the 1st of September, and that a part of the time he and his men worked night and day. And the court has also found that the channel was not laid out so as to permit work until the 8th of February, 1868. That is the effect of their finding; for until that time it could not be known where the work should be done.

It will here be borne in mind that the contract does not read that if Quinn did not complete the work by the 1st of October, that the engineer might declare it at an end and Quinn's rights under it forfeited. It reads:

"That if, in any event, the contractor shall delay or *be unable to proceed with the work in accordance with the foregoing terms*, the engineer officer in charge shall have full right and authority to take away this contract and employ others to complete the work, deducting expenses from any money that may be due and owing him."

Nothing is here said about completing the work He must "*delay or be unable to proceed*" before the contract can be taken away. This refers rather to the commencement of the work than to its completion.

As is stated in the case of *Bury Coms.* v. *Roberts*, such contracts are very unlikely to be completed at the time named. Surely that is so as to work of the character in question to be done at Eagle Harbor. It is enough for Quinn's executors that there is nothing in this contract authorizing the course pursued; there is nothing in it justifying any forfeiture of rights.

Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340, 341.
Roberts v. *Bury Coms.*, 5 B. L. R. (C. P.,) 325.
Russell v. *Da Bandeira*, 13 C. B. (N. S.,) 203, 205.
Van Buren v. *Digges*, 11 How., 477.

It is true that Quinn left Eagle Harbor about the 24th of September, and was gone for some time, and that on the 25th Bacon was there. Quinn finding no one there, after waiting over three weeks, had gone to head quarters at Chicago in reference to the matter; and though Bacon was at Eagle Harbor on the 25th, he was not prepared to lay out the channel, or do the necessary things for the commencement of the work. He had not the plans and charts, and he wrote Quinn to call at the office in Chicago and get them. *Record p.* 16, (*XIII.*)

But Quinn's absence did not affect the matter, for Bacon, if he had been prepared, might have proceeded to lay off the channel and fix the bench marks. He did not do it, and would not, if Quinn had been there, as he had not received the plans and charts by which to lay off the channel. When Bacon was there, he knew that Quinn had been there, and waited more than three weeks for him, and that he was temporarily away awaiting the preparation of the Government for the work, and he should have proceeded with his part of it; but not having his plans and charts he did nothing, and himself left on the very boat that brought him there. He did not return until the 25th of October, when he found Quinn there, and he did not make the necessary survey until Feb. 8th, 1868.

From the 8th of February to the 19th of August, Quinn worked in drilling and blasting, and it is found that a part of that time he worked night and day, and that he drilled holes sufficient to have exploded all the rock within the area set off for him; that on the 19th of August the stormy weather set in, and that nothing more could be done that year. In the mean time Quinn had gone to Ohio to get more nitro-glycerine, but did not then get it, though he did secure it later in the fall. *Record p.* 18, 19.

Now, it is to be borne in mind, that under the contract, Quinn was not entitled to be paid anything, unless "the work proceeds satisfactorily." *See Contract, Record p.* 15.

The contract provided that payment should be made upon these sections when the required depth has been obtained, delivered and accepted, reserving ten per centum until the whole should have been completed and accepted.

The court has found that Quinn was in fact paid $580.00 on the 13th of May, less the reserved ten per cent.; and on the 24th of July he received $580 less the ten per cent., and on the 10th of Sept. $580.00 less ten per cent, etc. This last payment was made after the season for 1868 had in fact closed, and the work for that season ended.

It could only be made upon the idea that up to that time Quinn had proceeded satisfactorily.

It will also be borne in mind that in the reasons given for refusing to permit Quinn to proceed with his contract, it is not stated nor hinted that he had not proceeded with his work satisfactorily.

Both Bacon and Wheeler had during the summer given Quinn to understand that his contract would be extended. *Record, p.* 18, (*XV.*)

How could this be done and the payments made, if he were not proceeding satisfactorily? And though among the reasons given, is one that Quinn was delayed by causes over which he ought to have had control, and by persons from whom he ought to be able to obtain redress, it is still not suggested even that he had not proceeded satisfactorily. That finding means simply that he might sue the company that failed to the furnish nitro-glycerine.

And it is evident that that is not the real cause for taking away Quinn's contract. It was found that the work could be done cheaper, and that the annual appropriation had not been made large enough to cover the work under the contract price. And thereupon they proceed to relet the work, to be done with powder, and throw away all Quinn's drilling, which it is found was sufficient to have blasted all the rock required. In the light of the finding of the court, this was surely a most remarkable course. Why was it done? Was it to give a show of a right to forfeit the contract and the amount done and earned under it?

ELEVENTH.

If the contract was properly taken from Quinn, the work must be done at his expense, to be taken from the money coming to him under his contract.

The clause relating to the taking away the contract is in these words:

"It is also agreed that if, in any event, the contractor shall *delay* or *be unable* to proceed with the work in accordance with the foregoing terms, the engineer officer in charge shall have full right and authority to take away the contract and employ others to complete the work, *deducting expenses from any money that may be due and owing him*, and the contractor will be responsible for any damage caused to others by *his delay or non-compliance*.

This is the only clause in the contract authorizing the engineer to take away the contract.

This is the usual provision in such cases where a forfeiture is not contemplated.

It is, in this respect, like the case of *Ranger* v. *The Great Western Railway Co.*, where the contract was taken from the contractor and under a clause much more favorable to a forfeiture. The matter was, nevertheless, referred to a master to ascertain the amount due. 27 *Eng. L. & E.*, p 74.

Nothing else can be made of the clause in question. It clearly sets out that as the consequence of the taking away of the contract, it is not forfeiture of monies already earned or of labor performed, or of the profits to be made from the contract, but the work is to be proceeded with at the expense of the contractor, and he would, of course, receive his $58 per cubic yard.

If the court below had held that the engineer rightfully withheld permission of Quinn to finish the contract, and, therefore, proceeded to relet the work, then the judgment should have been for the reserved ten per cent.—$1,740, and for $18 per cubic yard upon the remaining rock to be blown out, to wit: $33,060; and in fairness Quinn should also be credited with the value of the work done in perforating the rock with drill holes sufficient to have broken up the whole rock.

TWELVE.

The United States not having the right to refuse to Quinn an extension of time to complete his contract, are bound to pay him the profit he would have made by its completion.

It will be remembered that Quinn had perforated the rock with holes sufficient to have blasted out the whole rock to the required depth with nitro-glycerine. *Record pp.* 17, 18, (*XIV.*), and that nitro-glycerine was the best material to blast under water. These facts the court has found. *Record p.* 17, (*XIII.*)

What right had the United States after their own default, not only to sacrifice the $1,740 already earned, but to appropriate this work, or rather to do what was worse, to throw it away and drill other holes, for the use of an inferior material in blasting this rock. Nitro-glycerine could have been obtained for the year 1869—indeed had been obtained in the fall, and the United States were notified of this fact.

The court has found that nitro-glycerine "is the best explosive under water," (*Record p.* 17,) it being at least six times, perhaps ten or twelve times, the force of ordinary blasting powder. *Record p.* 17.

The court also finds that Quinn's holes were drilled "from 2 to 2½ inches in diameter, whereas holes for ordinary blasting powder to be effective for that purpose, should have a diameter of from 3 to 6 inches." *Record p.* 17. (*XIII.*)

These holes were drilled 6 inches below the fourteen feet required, and would, with nitro-glycerine, have been sufficient to blast the rock as required. This is also directly found by the court. *Record pp.* 17, 18, (*XIV.*)

The holes drilled by Quinn, with the use of nitro-glycerine, would have been more efficient than holes 3 to 6 inches with ordinary powder.

Why then should the United States not have used them? Under this contract they had no right to throw away this work and charge Quinn with the drilling of other holes.

If the work had been completed, as it should have been, by the use of the holes drilled by Quinn, then his profit would have been much greater than the $18.00 per cubic yard.

This would show the propriety of taking the profit which the court has found that Quinn would have made, had he been permitted to complete the contract.

And this leads us directly to the point whether that is not the true rule by which to find the amount due to Quinn's executor.

We say that the United States were in no condition to refuse Quinn the right to complete his contract: that their delay in having the engineer there in time to take charge of the work and to have the channel marked out and ascertained, and the bench mark fixed, deprived the United States of any right to refuse to Quinn further time to complete his contract.

The authorities heretofore cited, show clearly that Quinn, having been delayed by the United States, was not confined to the time named in his contract, and that the United States, having prevented his completing his contract, are bound to pay him the fair profits he would have realized by completing it.

Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How. 339, 340, 341, 342.

I need not here again go over them, but the following, among others, define the rule as we claim it to be.

Phil. Wil. & Bal. R. R. Co. v *Howard*, 13 How., 339.

Roberts v. *Bury Coms.*, 5 B. L. R. (C. P.,) 327.

Shute v. *Hamilton*, 3 Daly, 466.

Ranger v. *The Great Western Railway Co.*, 27 Eng. L. & E. 53, 55.

Russell v. *Da Bandeira*, 13 C. B. (N. S.,) 202, 204.

Green v. *Haines*, 1 Hilton, 255.

The Court of Claims erred in not giving judgment to Quinn for the $1,740, the reserved ten per cent.

This very question was made and decided in *Phil. Wil. & Bal. R. R.* v. *Howard*, 13 How., 339, 340.

Ranger v. *The Great Western Railway Co.*, 27 Eng. L. & E., 64.

The idea that this was not payable until the contract was completed, is fully answered in the case of *P. W. & B. R. R. Co.* v. *Howard*, 13 How., 242, 243.

See also *Van Buren* v. *Digges*, 11 How, 477.

And the court erred still more in this—if they found the case one in which the engineer in charge had the right to take away the contract, (which they did not do) they should then have allowed Quinn his contract price and charged him with the expense of completing the work. And I insist here that they had no right to throw away the holes already drilled, but should have blasted them with nitro-glycerine.

Waving this last point, however, there was a saving of $18 per cubic yard in the 1,740 yards still unremoved in the space laid out for the channel to be excavated, which, with the ten per cent. withheld, makes the sum of $33,060.

This is the clear result of the contract, if the work was taken from Quinn by the engineer in charge for delay or inability to proceed in accordance with the terms of the contract.

The case, in this respect, is much stronger than *Ranger* v. *The Great Western Railway Co*, 27 Eng. L. & E., where this course was ordered. *See final order in that case, page* 74.

If the delay of the United States was such as under the law to give Quinn further time, or to release him from the strict obligation to complete his contract on the 1st of October, 1868, then the United States could not claim anything more favorable than the right to complete the contract at Quinn's expense, allowing him the contract price therefor. Under the circumstances that was the least that could be allowed.

But the correct rule as appliable to this case, is to allow the administrator of Quinn to recover the profit he would have made upon his contract, to-wit: the sum of $58.682.

This follows from the authorities above cited, and we here call attention especially to the following:

Ranger v. *the Great West. Railway Co.*, 27 E. L. & E. 53, 57.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 440, 441.
Roberts v. *the Bury Coms.*, 5 L. R., (C. P.), 326
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Shute v. *Hamilton*, 3 Daly., 466.

right to refuse to Quinn further time to complete his contract.

The authorities heretofore cited, show clearly that Quinn, having been delayed by the United States, was not confined to the time named in his contract, and that the United States, having prevented his completing his contract, are bound to pay him the fair profits he would have realized by completing it.

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Waving this last point, however, there was a saving of $18 per cubic yard in the 1,740 yards still unremoved in the space laid out for the channel to be excavated, which, with the ten per cent. withheld, makes the sum of $33,060.

This is the clear result of the contract, if the work was taken from Quinn by the engineer in charge for delay or inability to proceed in accordance with the terms of the contract.

The case, in this respect, is much stronger than *Ranger* v. *The Great Western Railway Co*, 27 Eng. L. & E.,. where this course was ordered. *See final order in that case, page* 74.

If the delay of the United States was such as under the law to give Quinn further time, or to release him from the strict obligation to complete his contract on the 1st of October, 1868, then the United States could not claim anything more favorable than the right to complete the contract at Quinn's expense, allowing him the contract price therefor. Under the circumstances that was the least that could be allowed.

But the correct rule as appliable to this case, is to allow the administrator of Quinn to recover the profit he would have made upon his contract, to-wit: the sum of $58.682.

This follows from the authorities above cited, and we here call attention especially to the following:

Ranger v. *the Great West. Railway Co.*, 27 E. L. & E. 53, 57.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 440, 441.
Roberts v. *the Bury Coms.*, 5 L. R., (C. P.), 326
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Shute v. *Hamilton*, 3 Daly., 466.

Green v. *Haines*, 1 Hilton, 255.
Van Buren v. *Digges*, 11 How., 477, 479.
Russell v. *Bandeira*, 13 C. B., (N. S.), 202, 204.

It has been stated, that the clause relating to the taking away the contract from Quinn, in case he did not proceed with the work, related rather to the commencement of it at the time named, to-wit: September 1st, and that the United States being in default, in reference to that matter, could not complain, or refuse to him the chance to complete the work even after the time named.

I wish now to suggest, that the parties evidently did not have in mind or provide for the state of things which did in fact exist. The taking away of the contract was intended to apply to the time named within which it was to be performed.

Under the circumstances of this case, except where the contract does expressly provide, the court will take any fair, not to say, equitable view of the case, and not permit a forfeiture of rights, unless the agreement or the rules of law require it. The time when work of this kind could be done, at Eagle Harbor, during any year, was short. Upon only a small portion of the days in the year could work be done, and no one could tell when those would be, or when the season would commence or end. It turned out that the greater part of September and October the weather was good, and then again, when the survey was made on the ice work could have been done, if all had been ready. The windy season set in early in the year 1868, and brought all things to a stand till after October of that year. Work might have been done on the ice in the winter, or when the lake shore was frozen over, and Quinn was anxious to proceed, and urged that he might do so, but on the 23rd of October refusal was made, and on the 26th of January the work relet. *Rec. p.* 19, (*XV.*, *XVI.*)

No damage in fact did accrue to the United States. None is referred to by the officers acting upon this matter, and none is found by the court.

The delay of the United States in this matter, and the findings of the court, are of a character to forbid that Quinn should not complete his contract.

Neither the contract, the law, or the rules of fair dealing will permit the United States, under the circumstances, to forfeit Quinn's rights under said contract, or to take advantage of, or throw away his work under said contract.

And this would seem fair under all the circumstances, as he had done so large a part of the work upon the rock not removed.

III.

THE CONTRACT IN QUESTION WAS MADE UNDER A LAW AUTHORIZING IT, AND IT IS THEREFORE VALID.

FIRST.

The work of excavating the entrance to Eagle Harbor, to which this contract relates, was decided upon by Congress.

This has not been denied, and I shall not, therefore, go into this question fully here.

This point requires a careful examination of the acts of Congress of June 23, 1866; (14 Stat. at L., p. 71.) and the act of March 2nd, 1867; (14 Stat. at L., p. 418.)

In cases of this character, the rule is well settled that the profits the party would have made upon his contract, if permitted to complete it, is the rule for recovery of damages.

Masterton v. *Mayor, etc. of Brooklyn*, 7 Hill., 71.

United States v. *Speed*, 8 Wall., 84, 85.

Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 341.

This rule is so familiar that it is unnecessary to cite authorities.

These acts fixed upon certain public works to be done, and inaugurated the system of determining, by the engineers' department, the whole costs of the works determined upon, and of having an annual estimate of the amount that could be profitably expended during each fiscal year ; and appropriating so much thereto in each year, as could be profitably expended in that year, and not appropriating the whole sum necessary at one time, though by that system each class of work was to be let in one contract.

The work upon Eagle Harbor was first commenced under the THE ACT OF JUNE 23, 1866, which was:

> "AN ACT making appropriation for the repairs, preservation and completion of certain public works *heretofore commenced under the authority of law*, and for other purposes."

And it required the Secretary of War to:

> "Cause such needful examination of other harbors in the fourth section of this act specified, upon the sea and lake coasts, and on Western rivers, to be made, as will enable him to determine *what improvements thereof are required to render them safe and convenient for the navigation of the naval and commercial vessels of the United States, and the costs of such improvements ;* and he shall make full report thereof, and of the plans deemed advisable therefor, to Congress, at the commencement of the next session, for such action as may be judged expedient and right. And if, upon such examination and survey of works first herein named, being works now existing or in process of completion, and concerning which no sufficient information is now in possession of the department, there shall remain an unexpended balance of appropriation properly applicable thereto, for the survey herein appropriated, which may, in the judgment of the Secretary of War, be judiciously applied toward the economical and needful continuation or completion

of such work, the Secretary of War shall direct such balance to be applied and used accordingly." 14 *Stat. at L., p.* 71.

Certain works or improvements had been ordered by previous acts, in the manner and terms in which the works named in the said act were determined upon.

The 4th section of the act includes Eagle Harbor among those referred to in the first section quoted from above.

THE SECOND SECTION OF THE ACT is in these words:

Sec. 2. "*And be it further enacted*: that the money appropriated by this act, shall be so applied *as to complete, or make the nearest approximation to completing, the work for which each specific appropriation is made*; and it shall be the duty of the Secretary of War, *to apply the sums herein appropriated for other purposes than for examination and surveys by contract*; *Provided*, that no contract shall be made except after public advertisement for proposals in such form and manner as to secure general notice thereof, and the same shall only be made with the lowest responsible bidder therefor, upon security deemed sufficient in the judgment of the Secretary. And it shall be the duty of the Secretary, at the earliest practicable time, to report to Congress the result of any survey or re-survey, with the plan adopted, and the item of expenditure under said plan, and he shall make report of all action taken under the provisions of this act; and he shall accompany said report with a statement of the amount and date of all former appropriation for each work, *and a full estimate of its entire and permanent completion, with the amount that can be profitably expended in the next fiscal year*. And he shall also state in what collection district each work is located, and at or near what port of entry, light-house or fort; what amount of revenue was collected at the nearest port of entry for the last fiscal year; and as far as practicable, what amount of commerce and navigation would be benefited by the completion of each particular work; *Provided,* that he shall continue to make such a report at the commencement of every session of Congress, *until the works herein provided for shall be completed.*" 14 *Stat. at L., p.* 73.

On the 13th of October, immediately following this act, a full report, as provided for in said 2nd section, was made by William F. Reynolds, Major of the Corps of Engineers, to General Humphreys, Chief Engineer of the United States Army, which was laid before Congress at the commencement of the next session, as provided for in said act, and in which the plan for the improvement of Eagle Harbor was set forth, comprising the removing of the trap rock and the building of a pier or crib in front of the entrance of the harbor, with full details.

Showing the costs of removing the rock, to be	$146,016.71
The costs of the crib work,	45,172.86
Whole estimated costs,	$191,189.57

See Report of W. F. Reynolds to Major-General Humphreys, Oct. 13th, 1866.

With this report before it, Congress at the next session, on the 2nd of March, 1867, passed an act, similar to that of June 23d, 1866, above quoted from, entitled:

"An act, making appropriations for the repairs, preservation *and completion* of certain public works *heretofore commenced under the authority of law,* and for other purposes."

And in the first section of said act, among many appropriations for public works in the course of construction, is the following:

"For improving Eagle Harbor, Lake Superior, sixty-five thousand dollars." 14 *Stat. at L. p.* 419.

THE SECOND SECTION OF THIS ACT had similar provisions in reference to the harbor of Michigan City to those contained in the 2nd section of the act of June 23, 1866, above quoted, showing a settled policy of Congress to make a report of the full amount necessary for the completion of the work, and annual appropriation of such amounts as could be "profitably expended" during the next fiscal year, so that the appropriations should not be provided for and swelled to a greater amount than any purposes of the work needed for the then ensuing fiscal year.

THE THIRD SECTION OF THIS ACT, is as follows:

Sec. 3. "*And be it further enacted,* that whenever the Secretary of War shall invite proposals for any work, or for any material or labor for any work, there shall be separate proposals and separate contracts for each work, and also for each class of materials or labor for each work, and he shall report to Congress, on the first Monday of December next, all the bids with the names of the bidders. * * * And the moneys herein before appropriated, shall remain and be at the disposal of the Secretary of War, and subject to his control for the purposes named in this act, *until the several works and improvements herein provided for are completed, any law or regulation to the contrary notwithstanding.*" 14 *Stat. at Large*, 421, 422.

The report showing the bidders, and among them Quinn's bid, was made in accordance with this section. *See Report of Bacon of July 1st*, 1868.

These acts show several things:

1st. That the work in question was determined upon by

Congress, and that the contract in question was made in strict accordance with those acts.

2nd. That the appropriation in this case was for the fiscal year ending June 30, 1868.

The contract did not expire till the 1st of October, 1868, and another fiscal year was to commence on the first of July, 1868, and Congress was to be in session after June 30, 1867, and before June 30, 1868, and another appropriation was expected before the contract was to be completed. And it appears by the record that the engineer in charge reported, in accordance with the requirement of the two acts in question, that $100,000 could be profitably expended during the year ending June 30, 1869. *Bacon's Report of July* 13, 1868.

This shows, that in the opinion of the department charged with the execution of this work, the appropriation of $65,000 was "adequate to the completion thereof;" in the words of the Statute, it was all that could be "profitably expended" during the fiscal year ending in June 30th, 1868, when another fiscal year and a larger appropriation would be made; and therefore the appropriation was fairly "adequate" under these laws.

3rd. It shows that the work of blasting and excavating the rock was to be let in one contract; the crib work in another. (*See 3rd Section above quoted*); and as the rock excavation would amount to $146,016.71, and was to cover two fiscal years, it was under the terms of these statutes to be covered by two appropriations. AND THE THIRD SECTION OF THE ACT OF 1867, shows that this rock excavation was to be done under one contract, that being one kind of homogeneous work; and the crib work by another.

4th. Not only the provision for a yearly report of the amount that could be profitably expended during each fiscal year, (required by Congress as the basis of appropriation for each year), but the other specific language of the act, shows that it was understood that the appropriation was not to complete the contracts to be made therefor. It provides that the money appropriated shall, in the language of the statute, "make the nearest approximation to completing the work."

The second section of the act, making this appropriation for Eagle Harbor, has this provision:

"And the money appropriated by this act, shall be so applied as to *complete or make the nearest approximation to completing the work* for which such specific appropriation is made." 14 *Stat at L., p.* 425

5th. These acts also show that the various sums of money appropriated were to remain at the disposal of the Secretary of War for the completion of the works determined upon, and that what was not needed for one work, was to be used for another—here again showing, that it was not the intention of Congress, in reference to these works, to limit these contracts to the appropriation of any one fiscal year, or any one appropriation.

6th. Not only the title to these acts, but the specific provision show that the works were determined upon to be completed, and by appropriation for each fiscal year of so much as could be "profitably expended" thereon during that year, and that this appropriation was not to complete these contracts, but to make "the nearest approximation thereto."

SECOND.

The nature, character and expense of the work leads to the same conclusion.

The nature, expense and character of the work shows that Congress did not expect to stop with the appropriation of this $65,000, for this would be so much money thrown away, without the further appropriation to complete the excavation. *See Bacon's Report, aforesaid.*

THIRD.

The officers appointed by the law to carry these acts into effect so determined.

The above was the construction put upon these acts by the officers of the War Department, who were to see the work carried into effect, and they therefore proceeded in accordance with the 3rd section of the act of March 2, 1867, to advertise for the whole removal of the rock, though according to the estimate previously made and before Congress, and according to the several bids made, it would cost more than the sum appropriated for the then fiscal year. This construction put upon these acts by the officers of the Government, familiar with such works and with the act, and who were to carry them into effect, is not lightly to be set aside, but will be carried out unless clearly illegal. This is a well settled rule, especially relating to acts for works requiring practical and detailed knowledge to carry them into execution.

Union Ins. Co. v. *Hoge*, 21 How., 66.

Garrison Case, 7 Wall., 690.

Marnott v. *Brown*, 9 How., 635.

Greely v. *Thompson,* 10 How., 234.
2 *Opinions of Attor.-Gen.,* 538.

Speaking of the construction put upon a law of New York by the state officers, this court, in the case of the *Union Ins. Co.* v. *Hoge,* say:

"Although this practical construction cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt or where the error is not plain." 21 *How.,* 66.

This work was under the direction of the engineers' department of the Government, and related to a system of laws and works with which they alone could be familiar, and their construction of these laws should receive peculiar force for that reason.

FOURTH.

The third section of the act of March 2, 1867, provides that each kind of work be let by itself and in one contract.

Special attention is directed to the 3rd section of the act of March 2, 1867, where it will seem that each particular kind of work is to be advertised and let by itself, and it may fairly be presumed in one letting, as the most economical, as but one letting is referred to. And this justified the officers of the War Department, in the course they pursued in the advertisement and contract. This was the view taken of these laws by the department and officers designated to carry them into effect, and the construction of these acts in this regard ought not to be set aside by this court. *See cases cited on the third point, last above.*

FIFTH.

The appropriation adequate to the fulfillment of the contract.

The appropriation was "adequate to the fulfillment of the contract," for the reason that the latter covered two fiscal years, was all that could be profitably expended to the 30th of June, 1868; and by the system of these laws, would be followed by another appropriation, which would be in time for its completion in October, 1868, the time fixed by the contract.

SIXTH.

The Acts of May 1st, 1820, and of March 2nd, 1861 complied with

The act of the 1st of May, 1820, and of March 2nd 1861, as understood and applied to the acts of June 23, 1867, have been fully complied with, for the work in question was determined upon by Congress, and the mode specially pointed out in reference thereto followed.

Surely, after the acts of June 23, 1866, and of March 2, 1867, in which Congress, in clear terms, declares that the works are to be proceeded with till completed, and after the decision of the officer of the War Department thereon, the claimant had a right to take the work, as fully authorized by law; and to this effect are the determinations of this court.

In FOWLER'S CASE, (3 *Court of Claims, R.* 45,) the language of the act was in these words:

"For an enlargement of Congressional Library so as to include two wings, built fire proof, the space at either end of the present library, measuring about eighty feet in length by about thirty feet in width, in accordance with a plan to be approved by the committee on the library. One hundred and sixty thousand dollars, to be expended under the direction of the Secretary of the Interior." 13 *Stat. at L.*, 448.

The above is found among the numerous other items of expenditure of the general appropriation bill of March 2, 1865.

In that case there was no advertisement, no previous determination to do the work, such as the act of June 21, 1866; no previous report showing the full costs of the improvement; nor anything in the act indicating that the appropriation was but a partial one, as appears in the act of March 2, 1867, and there is, therefore, none of the ground for doubt or debate in this case that existed in that. Yet the contract was upheld, though it required more money than was appropriated.

There was therefore full authority here for the contract in question.

All of which is respectfully submitted.

T. D. LINCOLN,

Of Counsel for David Quinn.

SUPREME COURT OF THE UNITED STATES.

JAMES QUINN, ADMR. *vs.* THE UNITED STATES.—No. 110.

POINTS FOR ORAL ARGUMENT.

This case presents three distinct claims.

First. Did the Court of Claims err in refusing to render judgment for $1,740.—the ten per cent. withheld upon the rock actually removed. - - $1.740.

Second. Did that Court err in refusing to render judgment to Quinn for the $1,740. thus earned, and for the amount saved by the United States upon re-letting the work, amounting in all to - - $33,060.

Third. Did that Court err in not rendering judgment for Quinn for the profits he would have made had he been permitted to complete his contract, to wit - $58,600.

As touching these questions sundry facts and legal rules apply, and upon them I make the following points.

I.

The $1,740 was not forfeited to the United States.

FIRST.

Quinn was at Eagle. Harbor ready, able and desirous to proceed with the work provided for in the contract on the 1st of September, 1867, and there remained for more than three weeks waiting for the United States Engineer to lay out the work and give directions as to the place of deposit of the rock removed.

Facts found, Rec. p. 15, *V. p.* 20, *II.*

SECOND.

The Government had no engineer there at the time, nor was the work prepared on the part of the United States so that Quinn could proceed with the same.

Facts found, Rec. p. 15, *V; pp.* 15, 16, 17, *VI. IX.*

THIRD.

The things necessary to be done by the United States were not completed till the 8th of February.

Facts found, Rec. pp. 16, 17, *IX.*

Facts found, Rec. p. 17, *X-XI.*

A bench mark was necessary. *Fact IX, p* 17.

A survey of the harbor was also necessary. *Fact IX, p.* 16.

The United States Engineer should have been there to direct where to deposit the rock removed. *See Contract, Rec. p.* 14, *III.*

FOURTH.

As the time when the work could be done at Eagle Harbor was uncertain, and depended upon the weather, the United States were bound to have every thing ready and prepared on their part on the 1st of September, 1867.

Hudson Canal Co. v. *Penn. Coal Co.* 8 Wall, 288, 289.
Phil., Wil. & Bal. R. R. Co. v. *Howard*, 13 How, 341.
Blanchard v. *Blackstone*, 102 Mass., 347.

FIFTH.

The United States being at fault, in not being ready for the work on the 1st of September, 1867, nor ready for Quinn to proceed till February 8th, the time of completing the contract no longer bound him. The matter was opened and he had a reasonable time to perform.

Holme v. *Guppy*, 3 Mes. & Wels., 389.
Shute v. *Hamilton*, 3 Daly, 446.
Green v. *Haines*, 1 Hilton, 255.

II.

If the United States rightfully refused to permit Quinn to complete his contract, and they proceeded to do it, Quinn was entitled to the benefit thereof.

FIRST.

The engineer was not authorized to take away Quinn's contract unless, as a matter of fact, Quinn "was delayed" or "unable to proceed with his work in accordance with the terms" of the contract.

See the contract, Rec. p. 14.

SECOND.

There is no provision making the judgment or the opinion of the engineer binding upon that point, irrespective of the fact of inability to proceed, nor making his decision binding. His decision, "as to the quality and quantity," was agreed to be final, but in nothing else had he any such power.

See the contract, Rec. p. 14.

THIRD.

Much less was his opinion as to Quinn's right to proceed and finish his work as he desired to do, final upon his right under the contract. There is no provision in this contract giving him any such power, except only as to the "quality and quantity" of the work.

See the Contract, Rec. p. 14.

The maxim, *expressio unius, exclusio alterius*, excludes the idea that his judgment, opinion or determination was to be binding in anything else, except as to the quantity and quality of the work.

FOURTH.

The contract provides:

"That if, in any event, the contractor shall delay or be unable to proceed with the work in accordance with the provisions of the contract, the engineer officer in charge shall have full right and authority to take away this contract and employ others to complete the work, *deducting expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or non-compliance.*"

The engineer had no other or further power or authority to take away the contract, or to prevent Quinn completing his contract, even after the 1st of October, 1868. If the engineer did decide to take away Quinn's contract and complete the work, he was bound to credit what is made thereby to Quinn.

FIFTH.

To authorize one party to forfeit an amount due under a contract, or to put an end to it, upon alleged breaches thereof by the other party, which do not go to the whole consideration, there must be clear and distinct terms providing therefor. Such authority will not be inferred from language which could be otherwise construed.

Rogers v. *The Bury Commissioners*, 5 B. L. R., (Com. Pleas), 326.

Phil., Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340.

Lauman v. *Young*, 31 Penn. R., 309.

See brief p. 22 to 29, and authorities cited and quoted from.

SIXTH.

The engineer of the United States performed the unfinished work in 1869, when Quinn desired to complete it, at a saving of $18.00 per cubic yard. *Rec p* 19, *XVI.*

Quinn's Administrator was entitled to that saving upon the 2040 cubic yards set off by the engineer for him to remove, less what was completed and partly paid for, which
amounts to - - - - - - - - $31,320.00
Add to that 10 per cent. withheld, - - 1,740.00

And there would be, - - - - - $33,060.00

This much is due Quinn's Administrator, if the United States were acting within the terms of the contract, and had a right to take it from Quinn.

The Court of Claims therefore erred in not rendering judgment for at least the above sum.

III.

The Court of Claims should have rendered judgment for Quinn's Adm'r, in the sum of $58,682—the profit he would have made had he been permitted to complete the contract.

FIRST.

Quinn had a right to complete the contract, and the engineer had no right to prevent it. Having been in default herself, the United States could not insist upon the work being completed in the time named, and Quinn therefore had a right to proceed therewith.

Allamon v. *Mayor and Ald., etc.*, 43 Barb., 36, 37.
Shute v. *Hamilton*, 3 Daly, 465.
Holme v. *Guppy*, 3 Mes. & Wels., 389.
Russell v. *DaBaudeira*, 13 Com. B. N. S., 203.
Ranger v. *The Great Western R. W. Co.*, 27 E. L. & E., 53, 57.
Roberts v. *Bury Commissioners*, 5 L. R., (C. P.) 326.
Phil. Wil. & Bal. R. R. Co. v. *Howard*, 13 How., 340, 341.

SECOND.

The reasons given for not permitting Quinn to complete his contract are not such as the law recognizes as fair between the parties under the contract.

Rec. p. 18, *Fact found XV.*

Phil. Wil. & Bal R. R. Co. v. *Howard,* 13 How., 308, 344.

Brief, pp. 19, 20.

THIRD.

Quinn was induced to believe that his time would be extended, until it was ascertained that the work could be done at a cheaper rate.

Rec. p. 18, *Fact XV.*

FOURTH.

That Quinn had proceeded satisfactorily with his work is evident from the fact that up to the 10th of September, at which time the winds set in, the engineer had paid him for the rock removed, which, under the contract, he could not have done if the work had not proceeded satisfactorily. *See contract, Rec p.* 14, *and see time of payment, Rec. pp,* 17, 18. *Fact XIV,*

FIFTH.

The settled rule of damages in such a case is the profits the party would have realized had he been permitted to complete his contract.

The United States v. *Speed,* 8 Wall., 84, 85.

Masterton v. *Brooklyn,* 7 Hill, 71.

Phil. Wil. & Bal. R. R. Co. v *Howard,* 13 How., 344.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

J. W. WALLACE, ADMINISTRATOR, &C.
vs.
THE UNITED STATES.
} No. 110.

BRIEF FOR THE UNITED STATES.

The contract in question upon the part of Quinn, the intestate of the plaintiff, was that he "*shall remove the rock, &c., and deposit it at such point as the engineer in charge may direct;" that he "shall commence such removal on or before the 1st day of September, 1867, and complete it on or before the 1st day of October, 1868. It is also agreed that if in any event the contractor shall delay, or be unable to proceed with the work in accordance with the foregoing terms, the engineer officer in charge shall have full right and authority to take away this contract and employ others to complete the work, deducting the expenses from any money that may be due and owing him.*" Upon their part the United States *agreed to pay "for the removal of the rock removed," $58 per cubic yard, with a provision that, if the work proceed satisfactorily, payment shall be made from time to time, reserving ten per cent. from the payments until the work shall have been completed and accepted.*

In the event the work was neither commenced nor completed at the times specified, and the contract having been taken away from Quinn, this action was brought to recover damages incurred by him, which he claims to be the profits that he would have made if allowed to complete.

The findings show that the plaintiff was not ready at the time specified for commencement. Upon this point the case made by him is that *on the 29th of August he went to Eagle Harbor, and immediately engaged in making inquiries as to what kind of materials and help he could get there for the work, and in securing mechanics, &c., in reference to doing said work; that about the 1st of September he engaged a blacksmith to make tools, and, through him, came in the early part of September into the possession of four drills and a dozen grasping-hooks*, page 15 (V); *that in September he was making preparations to proceed with the work*, page 17 (XII); and *that, although at the time of letting the contract to Quinn, Bacon, (the engineer who was to direct the work,) was present in the office of Wheeler, (the United States officer who let the contract,) and was told by Wheeler that he should be notified when the contractor would be ready to proceed with the work, no such notice was received from either Wheeler or Quinn.*

It is submitted that this disproves the *important* allegation in the petition, that upon the 1st of September the claimant *was ready to commence operations.*

As regards readiness at that day upon the part of the United States, it appears that the directing engineer was absent from Eagle Harbor on the 1st and until the

24th of September. This circumstance is to be modified by what passed (with the privity and consent, as it seems, of Quinn) at the time that the contract was let, as above. It also appears that an error existed as to the amount of rock required to be removed. That amount turned out to be 3,600 cubic yards, or more than twice *what* had been estimated.

Admitting that the United States were not ready to give the necessary directions to the contractor, it appears that *neither party* was ready to proceed with the contract.

In this case either might have rescinded without being liable for damages to the other. This course, however, was not taken, but both parties waived the point, and proceeded without noticing it.

The state of the weather after October 25 (a circumstance no doubt calculated upon when the contract was made) hindered further action until February 8, 1868, when Quinn began work without protest as to any *delay* occasioned by the United States, or any suggestion or understanding that his position had been prejudiced by what had occurred. Nor was there any such suggestion until after he had failed to complete the contract because of the delinquency of those with whom he had contracted for nitro-glycerine.

In this connection the following remarks seem pertinent and well founded:

1. If the failure to complete were occasioned by the want of nitro-glycerine, then even supposing Quinn to have been ready and the United States unready on the 1st of September, and the delay till February 8 to be attributable to the latter, this latter circumstance does

not appear to have been in any degree a cause of such failure; but if it were such in any degree, it was plainly *causa remota*, the want of the explosive being the *causa proxima, which in such cases is always exclusively looked to.*

2. But as both parties were unready, neither can avail itself of unreadiness in the other.

3. As the terms of the contract so far as they were still possible to be performed were not within the control of the agents of the government (they being empowered, as the contractor knew, to contract only *after advertisement, in writing*, &c.; see Clark *vs.* The United States, 95 U. S., 539; Hawkins *vs.* The same, 96 U. S., 689), it will be assumed that when Quinn went on with the work he was (and was conscious of) doing so under an obligation to complete it by the 1st day of October. (See Gibbons *vs.* The United States, 8 Wall., 274.)

4. There is nothing upon the record to show that it was impossible to complete the contract between February 8 and October 1.

5. It appears that but for the want of nitro-glycerine (as said above) the contract would have been so completed. See p. 17, second paragraph of finding XIV; Quinn's letter of October 5, 1868, p. 18 (XV), and the claimant's suggestion for a finding, p. 20 (X), which suggestion seems to be as solemn as if it had been found in the petition.

6. There is nothing in the contemporaneous communications between Quinn and the engineers to show that either apprehended failure because of the delay to begin (such delay being for all practical purposes only between September 1 and October 25), p. 17 (XII). What, in reference to an extension, passed between Wheeler & Bacon on the one side and Quinn on the other is more

probably to be referred to the difficulty in procuring nitro-glycerine than to the delay, because the *context* of such communications, viz, the letter *based upon them* asking for an extension, alluded only to that, p. 18 (XV).

It is significant of the unimportance of the delayto begin, that no allusion was made to it by either the contractor or the engineers or, so far as known, any one else until several weeks after an extension had been refused, and after Quinn had probably consulted counsel and been advised to present a paper as a basis for a demand of damages.

That this was *an afterthought* (if it were) is fatal to its value in the present suit.

Upon the whole, it appears: that it was necessary for the claimant, under the most favorable theory of his rights, both to *allege* and to *prove* that after the delay between September 1 and October 25, 1867 (or, say, February 8, 1868), it was impossible to complete the contract by the 1st of October, 1868: that, therefore, such impossibility has been *alleged* (see petition, p. 10, fourth paragraph from top): but not only that it has not been *proved* (has not been *found*), but has been *discredited*, if not positively *disproved*.

The learned and distinguished counsel for the claim ant suggests that the time of completion was not *of the essence* of the contract. That is an expression borrowed from the courts of equity. The time within which a party agrees to do a certain work is generally material at law. 2 Chitty Contracts (ed. 1874), p. 1066; Slater *vs.* Emerson, 19 How., 224; Dermott *vs.* Jones, 23 How., 224.

There is nothing upon the face of the contract here to take this case out of the general rule, while, upon the contrary, immediately after providing a day for completion, the instrument proceeds to empower the *engineer officer* in charge, in case the contractor shall delay or be unable to proceed *in accordance with the foregoing terms*, "to take away this contract and employ others to complete the work, deducting expenses from any money that may be due and owing him." This clause is probably superfluous as to *failure to complete*, but shows, *a fortiori*, what importance was attached to that failure, when *even delay to commence*, &c., might be visited with forfeiture.

It seems not necessary elaborately to reply to what is said by the learned counsel as to the new employment being *for the benefit of the old contractor*—so far as profits go. It seems plain that upon taking away the contract no interest thereunder (so far as it was still *executory*) remained in him; and so that no money for its further execution could be *due and owing him*. The clause referred to probably means that if the new contract were at a higher price the United States could apply the 10 per cent. retained, or any other money due to the old contractor up to that time, so as to bring such price down to the figures which *he* had agreed upon.

In conclusion, it is submitted that the relations between the United States and the claimant after the 25th of October, 1867, were such that while the former might become liable to the latter for any work actually done and received, there remained no ground upon which the latter could claim damages for a refusal of permission to proceed. At all events, *for all that was executory* about the alleged contract (?) to remove the rock *within a reasonable time* the United States have never been bound. It may be that by the contract the United States agreed to pay for the work *by sections*, ascertained to have been satisfactorily completed, and therefore that as the second contract was for a lower price than the first they still owe the claimant the money retained as 10 per cent. upon the three sections found to have been finished.

We add that no unfavorable criticism can be based upon the *reasons* given by Colonel Wheeler for not extending the contract, when it is considered that he was an executive officer, dealing only with the *expediency* of *extending* a contract supposed to be already forfeited *in law*. Reasons arising out of the *high price* allowed by such contract, and the *state of the appropriation*, were pertinent and valid. They might not be such, were the question one as to the *validity* of the first contract.

CHARLES DEVENS,
Attorney-General.
S. F. PHILLIPS,
~~*Assistant*~~ *Solicitor-General.*

the alleged contract [illegible] recover-
able from the United States has never been found. It
may be that by the contract [illegible] agreed to
pay for the work [illegible] to have been sat-
isfactorily completed, and [illegible] that as the second
contract was not a [illegible] than the first [illegible]
owe the claimant [illegible] as 15 per cent. upon
the [illegible] to have been finished.

We hold that [illegible] can be based
upon the reasons [illegible] for not [illegible]
[illegible] that he was
an [illegible] the [illegible] of
[illegible] already [illegible]
[illegible]. Reasons [illegible] by
such contract, and [illegible]
[illegible] were the
[illegible] the first contract.

[illegible]

[illegible]

WALLACE, ADM'R,

vs. No. 110.

THE UNITED STATES.

REPLY TO THE BRIEF OF THE SOLICITOR-GENERAL.

The United States filed their brief in this case on the morning of the day it was called for argument, after the meeting of the court. A copy of it was handed the undersigned in the court-room after the opening of the court. I had no opportunity to examine it before the case was called for argument, nor until my argument was so far completed, that I had then no time left to reply to it verbally. I therefore ask to present this brief reply.

FIRST. It is assumed, on page 2 of the brief, and reiterated on page 4, that Quinn was not ready to commence work on the 1st of September, 1867. The contrary is directly found. (*See Record,* 15, *Fact V; Record,* 20, *Fact II.*)

It is, however, said that Bacon was told by Wheeler that Quinn would notify him when he was ready.

There was no evidence of any such understanding, and no finding to that effect, or that Quinn was aware of any such information given by Wheelor to Bacon. There is no finding that Quinn was present when this statement was made by Wheeler to Bacon. On the contrary, the contract expressly provided that he should commence with the work on the 1st of September, 1867, and proceed therewith without delay; and he was there for

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The statement on pages 2 and 4 of the brief, that neither party was ready on the 1st of September, is disproved by the findings of the Court of Claims.

Second. It is stated, on page 3 of the brief, that Quinn having commenced on the 9th of February, without protest against the delay, he thereby waived his right to object to the delay. This consequence does not follow. He was not bound to protest to preserve his right. This is expressly decided in several cases.

Allamon v. *Mayor and Aldermen*, 43 Barb., 38.
Van Buren v. *Digges*, 11 How., 461–479.

As is said by this court in *Van Buren* v. *Digges*, 11 How., 479:

"Mere acquiescence in this irregularity of the plaintiff should not subject him to further mischief."

The point was there set up against the plaintiff.

Under this head, it is said, in the brief, that if the failure to procure the nitro-glycerine was the reason why the contract was not completed, the failure of the United States was the remote cause only.

The record does not show that Quinn could have completed the job between the 9th of February and the 1st of October. When the United States sets that up, the burden is upon it to show it.

Allamon v. *The Mayor and Aldermen*, 43 Barb., 38.

The Court of Claims expressly refused to find that Quinn could have done it. (*See finding X, asked and refused; Record*, 26.) Quinn went on working nights when he could, with the hope that he might get through. He no doubt could have exploded more of the rock and removed it before the rough weather set in, and thereby got some portion of the compensation due him for the rock drilled; but the record does not show that he could have completed the removal of all the rock. When the United States admit the delay, and the embarrassment caused thereby, the burden is upon her to show that he could have done it, or that he did not in fact do all that it was possible for him to do.

THIRD. It is also claimed, that as the contract must be in writing, and made only after advertisement, that Quinn must be held to proceed upon the idea that the work must be completed on the 1st of October.

It does not follow that any new contract is necessary. The delay of the United States simply opens up the *time* of completion of the contract. Quinn might have refused to go on, and recovered in damages the loss of his profits by the delay. (*Ranger* v. *The Great Western R. W. Co.*, 27 Eng. L. and E., and *Phila., Md., & Balto. R. R. Co.* v. *Howard*, 13 How., 341, 342.) Or he could proceed, relying upon the rule of law that the time of finishing the contract was, by the well-settled rules of law applicable thereto, opened up and set at large. The contract still exists, and the parties proceed under it, and must claim their remedies under it; but the act of the United States relieved Quinn from the performance on the day named, by a rule of law well established.

Green v. *Haines*, 1 Hilton, 255.
Shute v. *Hamilton*, 3 Daly, 466.
Allamon v. *The Mayor and Ald.*, 43 Barb., 37, 38.

The United States might waive provisions of the contracts made for her benefit in the practical execution thereof.

Still more might her conduct open up the time when a contract was to be completed.

Fourth. It is in various ways intimated in said brief that the record does not show that it was impossible to complete the work within the time named in the contract. But the record shows two things—

1st. Delay caused by the United States at the beginning, and there is nothing to show that if Quinn could have proceeded during the fall of 1867 he might not have obtained the nitro-glycerine then, and got through with his job. The court cannot tell from the record that he would not.

2d. The record shows activity and energy on the part of Quinn from the time when he could begin his work.

These facts throw the burden upon the government to prove that he could have completed his job, after the delay caused him, had he received his nitro-glycerine.

It is said to be a significant fact, in this respect, that Quinn, in his letters, does not refer to the delay of the government as a cause of his not completing his contract. Here again the learned Solicitor-General is in error. It is expressly found by the court that on the 25th of November, and again on the 5th of December, that he made showing for his right to complete his contract, setting forth, among other reasons, the default of the government in not having the work in readiness until the 9th of February. (*See finding VI, Record*, 20.) At first he hoped to get an extension, and did not care to call the attention of these officers to their own neglect.

It was not necessary, as is claimed on the fifth page of the learned Solicitor-General's brief, for Quinn to allege or prove that after the delay of the government, between the 1st of September, 1867, and the 9th of February, 1868, he could not have completed his contract. It was for the government to show that he could.

Fifth. On the sixth page of the brief of the learned Solicitor-General, it is said that the engineer had the right to take away the contract, and that thereafter the claimant had no interest in it, so far as it was executory.

Now, this assumes several things—

1st. That after this delay of the government, the United States had a right to take away the contract. We insist that she had not, and that the simple judgment, or act of the engineer in so doing, does not establish that right.

His right to take away the contract depended not upon his opinion or judgment, (for the contract does not so provide,) but upon the fact of such delay, to be proven by the party claiming a forfeiture, because of such delay. (*Ranger* v. *The Great West. R. W. Co.*, 27 Eng. L. & E., 55.)

That case is referred to in the brief filed by me in this case, on page 30, and the court is referred to the statement and quotation from the opinion there expressed. The quotation is taken from page 55 (not 35, as there printed) of the 27th Eng. L. & E. Reports.

It will be borne in mind that the United States claim, by way of forfeiture—

1st. The ten per cent. received.

2d. The labor and expense of drilling the holes in the rock,—a whole summer's work,—in which Quinn worked night and day.

3d. His preparation for his contract; his capital invested, and from which he expected to reap his profits.

Now, forfeitures of this kind are not favored in law, and must be clearly shown, both in fact and in law.

> *Phil., Md. & Balt. R. R. Co.* v. *Howard*, 13 How., 340.
>
> *Roberts* v. *The Burg Comm'rs*, 5 B. L. R., C. P., 326.
>
> *See this matter considered in the brief*, pp. 22 to 29.

And a forfeiture cannot be claimed by a party himself in fault in the matter in question. #

We deny, therefore, the first assumption in this brief: that the engineer had the right, under the circumstances of the case, to take away Quinn's contract. We say that the contract so provides only in the case that the contractor

A waiver of a forfeiture will be found from slight evidence
Young v. M. L. Ins. Co. 2 Sawyer. 384
N. W. M. L. Ins. Co v. Ger. F. Ins. Co. 40 Wis. 453
Gans v. The St. Pauls F. & M. Ins. Co 43 Wis. 114

should "delay or be unable to proceed with the work according to the terms" of the contract, and that the United States in this matter cannot rest upon the opinion or act of the engineer, but must prove the *fact* authorizing the taking away the contract.

2d. This statement of the learned Solicitor-General assumes another point, to wit: that when the contract was taken from Quinn the latter had no further interest in it; whereas the contract only provides for its being taken from Quinn, to be completed by some one else; and it provides that the expense of completing it is to be charged to him, and to be paid from the money coming to him. The learned Solicitor-General is compelled to assume that the entire expenses of completing the contract are to be paid from what Quinn had previously earned; and if that was not sufficient, then that he was liable for the balance, or he must admit that Quinn was still to be credited with the amount under his contract.

The object of this clause was the same as that reserving the 10 per cent. It was to secure the performance of *this* contract, and Quinn was of course to be credited with the amount coming under it.

It might be quite smart to put Quinn into a position where he could not complete his contract within the time, and then take it away from him, and forfeit all his rights, because it could be done cheaper *if the contract provided therefor*.

But there is the difficulty in the case of the United States. The contract does not provide any such thing. It evidently contemplated a very different thing, to wit, the completion of the work and at the expense of Quinn, and that he should receive the benefit of it, and be liable for all its expenses. This was fair and right. It secured to the United States what the contract provided for, and it forfeited nothing. The harsh doctrine of forfeiture, always reluctantly resorted to in the law, has no place in this contract.

The opinion and judgment of the engineer is final but upon one matter, to wit, "the quality and quantity" of the work. In nothing else was his opinion or decision binding. In case the contract was taken from Quinn, and the United States were sued for it, or for the profits he would have made, the United States must prove the facts authorizing the taking of the contract from him. There is nothing in the record showing any such right, but there is much in it showing that no such case did in fact exist.

When it is claimed that Quinn has forfeited not only his ten per cent. earned, but the value of the holes drilled, his contract, and the profits growing out of it, it is not for him to show that he has not forfeited them. It is for the United States to show that he has, and to prove *the facts* upon which such forfeitures can rest.

Sixth. As to any unfavorable criticism upon Colonel Wheeler's conduct, I have not made any. I have simply maintained that the reasons which he gave for the taking away of the contract were not such as authorized that course to be taken. And I may here call the attention of the court to the fact that he does not pretend that Quinn had not proceeded satisfactorily with the work. He could not do it; for he had, during the time, paid him money due under the contract, only upon the idea that he was proceeding satisfactorily to the United States, and these payments extended to the 10th of September, 1868. This was nearly a month after the last work was done. (*Finding XIV*, *Record* 18.)

Respectfully submitted,

T. D. Lincoln,

Counsel for Quinn's Administrator.